TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 227.

BEHN, MEYER & CO., PLAINTIFF IN ERROR,

vs.

CAMPBELL & GO-TAUCO.

IN ERROR TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

FILED MARCH 19, 1906.

(20,135.)

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1 UNITED STATES OF AMERICA:

In the Supreme Court of the United States.

No. 1490.

THE FIRM OF CAMPBELL & GO-TAUCO, Plaintiffs and Appellants,
vs.
BEHN, MEYER & COMPANY, Defendants and Appellees.

Bill of Exceptions.

UNITED STATES OF AMERICA, *Philippine Islands:*

In the Court of First Instance of the City of Manila.

Department II.

Civil Cause 1181.

O. F. CAMPBELL ET AL., Plaintiffs,
vs.
BEHN, MEYER & COMPANY, Defendants.

Be it known, that in the above entitled matter the following proceedings were had:

On September 30, 1902, plaintiffs filed their complaint, which is as follows:

"The plaintiffs complain and allege:

I. That the plaintiffs are residents of Manila, and now are, and at all times hereinafter mentioned were, co-partners doing business in Manila under the firm and style of Campbell & Go-Tauco.

II. That the defendant is a commercial association, with headquarters in Singapore, duly registered and acting under the laws of the Philippine Islands, and also doing business in the city of Manila.

2 III. That on the 20th day of June, 1901, the plaintiffs contracted in writing with said defendant: (a) to build a dwelling-house on land of said defendant on the Pasig river, near Malacañan Palace, in Manila, as per plans and specifications attached to the contract, for the sum of 13,000 pesos, to be paid as follows, viz.: "4,000 pesos when the necessary materials are on the ground and work commenced; 4,000 pesos when the house is finished with walls, roof, etc.; 5,000 pesos on the completion of the work, which will be completed within three months"; (b) to install a water system to stable, kitchen, baths, and water-closets, and drain tubes from the same, for the sum of 500 pesos; and (c) to construct a stable according to specifications for the sum of 1500 pesos, payment upon completion. Said contract was signed by both plain-

tiffs, and a copy of the same is hereto appended and marked "Exhibit A."

IV. That the plaintiffs have fulfilled their part of said contract; that any delay in the completion of the same has been due to changes, alterations, and modifications in said contract, ordered and contracted for by said defendant from time to time with said plaintiffs; that there is now due and owing from said defendant on said contract of June 20th, 1901, the sum of fifteen hundred (1500) pesos, as follows, which it refuses to pay, though often requested: On item (a), 1,000 pesos; on item (b), 500 pesos.

V. That on various dates subsequent to June 20th, 1901, plaintiffs have contracted with the defendant, either verbally or by correspondence, for alterations and improvements in and to the building mentioned in said original contract of June 20th, 1901, and the premises on which the said building is situate, to wit:

A. On or about December 28th, 1901, to make an alteration to the house in the nature of an addition thereto, for the further sum of 4,000 pesos.

B. To pave the entrance to said premises and build a partition and two doors, for the further sum of 305 pesos.

C. To furnish a ceiling for lower story in said house, including balcony (445 sq. metres @ $2.50), for the further sum of 1112.50 pesos.

VI. That the plaintiffs have provided labor and material and have fully performed their part of the above contracts, on which the entire sum of 5417.50 is now due them from said defendant, which said defendant refuses to pay, though often requested.

VII. That on or about May 1st, 1902, the defendant took possession of said premises and has since occupied them to the exclusion of said plaintiffs.

VIII. That the successive changes, alterations, and additions in and to the improvements upon said premises have so far
3 modified the original contract of June 20th, 1901, as to entirely change the amount and character of the labor to be performed and material required, as well as the time necessary for completing said contract; that the plaintiffs have carried out the several contracts hereinbefore set forth, and at the request of the defendant have further made a variety of changes, alterations, and improvements in and to said premises, outside the said contractual obligations, to the value of twenty-three hundred thirty-three and 12/100 ($2333.12), as follows, which sum is now due and owing from said defendant to said plaintiffs:

Stone wall about house, 25 m. @ $16	$400.00
15 doors changed from 3d group to superior group with glass, @ $35	525.00
19 Louvered transoms, @ $20	380.00
2 bath tubs @ $40	80.00
Galvanized iron wall, wood studding for spiral stairs	160.00
Double doors below on river side	65.00
2 windows lower, @ $30	60.00
Drain pipes, 46.64 lin. met., @ $8	373.12

1 Bridge	50.00
Extra depth of post foundations, 18 m. @ $10	180.00
Pillar under sala	60.00
	$2332.12

Wherefore, the plaintiffs pray that judgment may be rendered against said defendant in this action, and that it be ordered to pay the said plaintiffs the sum of nine thousand two hundred and fifty and 62/100 pesos, with interest on the several sums from the time they became due.

That the plaintiffs have such other and further relief as to the Court may seem just, together with the costs of this action.

(S'g'd) TERRELL & TUTHERLEY,
Att'ys for Plaintiffs."

4 PLAINTIFFS' EXHIBIT A.

"MANILA, P. I., *June* 20, 1901.

Messrs. Campbell & Go Taoco likewise agreed to construct for Messrs. Behn, Meyer & Co. a dwelling-house upon the property referred to, for the sum of Thirteen Thousand Pesos Mexican, in accordance with the annexed plan and specifications. Upon this property there shall be made to Messrs. Campbell & Go Taoco three payments: Four thousand when the necessary materials shall have been placed upon the ground and the work shall have been begun; four thousand pesos when the house is finished, with its walls, roof, etc.; and five thousand pesos upon the completion of the work, which must be within three months.

For the installation of drinking water in the stables, kitchen, baths, kitchen, and water-closets, and the drainage necessary for the same, we agree to pay five hundred pesos.

For the erection of a stable in accordance with the conditions as set forth, fifteen hundred ($1500) pesos Mexican, payable upon the completion of the work.—Accepted.

Per Pro BEHN, MEYER & CO.
(Signed) J. KATENKAMP.
(Signed) O. F. CAMPBELL.
(Signed) G. C. TOACO."

On November 24, 1902, the defendants filed their answer to the said complaint, which said answer is as follows:

"I. Admits the allegations of the first paragraph.

II. Admits the allegations of the second paragraph.

5 III. Admits the allegations of the third paragraph; admits the correctness of Exhibit A, referred to in the third paragraph, and attaches hereto copies of the plans and specifications referred to in Plaintiffs' Exhibit A, which copies are marked Exhibit A1 and Exhibit A2 respectively, and are hereby made a part hereof.

IV. Denies each and every the allegations of the fourth paragraph.

V. Admits each and every the allegations of the fifth paragraph, except the allegations of clause C thereof, which are denied.

VI. Denies each and every the allegations of the sixth paragraph, except the allegation that defendant refuses to pay to plaintiff said sum of $5,417.50, or any other sum, which is admitted.

VII. Denies each and every the allegations of the seventh paragraph, but admits that on or about May 12th, 1902, defendant took possession of said premises.

VIII. Denies each and every the allegations of the eighth paragraph.

Alleges:

IX. That plaintiff has not completed the defendant's dwelling-house referred to in plaintiff's Exhibit A according to the plans and specifications also referred to therein, or at all, but has refused to do so, and has abandoned work upon the said house since about the first day of May, 1902, although frequently requested by defendant to complete said house in accordance with said contract.

X. That on the 25th day of February, 1902, plaintiffs at the request of defendant made a written statement of all work contracted for with the defendant, a copy of which statement is attached hereto marked Exhibit B and which is hereby made part hereof; that on or about the same day defendant notified plaintiffs that no extra work or changes in said plans or contract or on said dwelling-house or premises would be paid for unless agreed to in writing by the defendant; that on the same day defendant by its letter, a copy of which is hereto attached marked Exhibit C and hereby made a part hereof, agreed to two of said changes as therein specified.

XI. That except as herein otherwise admitted or alleged, defendant neither requested nor consented to any changes, alterations, or improvements in or on the said premises or dwelling-house, and that all changes, alterations, or improvements not herein admitted or alleged, that were made by the plaintiffs, were made wholly without the consent of the defendant and at the sole risk and cost of plaintiffs.

By way of counterclaim against the plaintiffs, defendant alleges:

I. That the plaintiffs have constructed the said dwelling-house in a negligent and unworkmanlike manner and in violation of the contract and specifications as changed, in the following particulars:

A. The foundations for the pillars of the house are of an
6 average depth of 32 centimeters, and in no case of more than 50 centimeters, and all the foundations for the pillars of the house are laid upon the surface of the soil.

B. The foundations of the walls of the house are of an average depth of 50 centimeters, ranging from 16 centimeters to 1 meter in depth, and are laid upon the surface of the soil.

C. The blocks or rockers upon which the pillars bear were made of unsound wood.

D. The splicing of the upper to the lower parts of the pillars is insecure and unstable, not strapped and with but two bolts.

E. None of the doors in the house fits its frame, none can be opened and closed easily, and many cannot be closed; none of the doors is provided with a sill; many are so hung that there is an

open space of from five to eight centimeters between the door and the floor; in no case are there proper sockets at top and bottom of the frame to receive the bolts and secure the door.

F. The floors of the house are laid with many short boards, with wide interstices between the boards, with patches of wood and putty to conceal defects; in many places the joints of the boards — not broken; all the floors are rough and uneven and badly laid; and constructed of boards not properly seasoned which have consequently warped and shrunk.

G. The floor of the verandah slopes toward the house on all sides, causing the house to be flooded during rains.

H. The rubberoid is improperly laid, is tacked underneath the purlins and rafters, is torn and loose in many places, and useless for its intended purpose; the roof has many holes and leaks badly; the framing of the roof is improperly fitted and the trusses at the top of the king-posts are drawn apart from ½ to 2½ centimeters.

I. The baths are so constructed that they will not hold water and cannot be used.

J. In addition to the defects herein specifically named, the workmanship of the entire house in all its parts is negligent and bad, and the whole structure is improperly built.

II. That the soil upon which said dwelling-house stands is light and sandy and in close proximity to the Pasig river, and, as the plaintiffs well know, the foundations for the walls and for the pillars should have been laid below the surface of the soil, and should have been at least one meter in thickness below the structures which were to be supported by them.

III. That on the 12th day of October, 1902, plaintiffs contracted with defendant that plaintiffs should construct the lower
7 seven feet of each pillar of said dwelling-house of superior group wood, and that said lower parts should be well joined to the upper parts of said pillars and firmly strapped and bolted.

IV. That on account of the improper construction of the foundation and other parts of the house, as hereinbefore alleged, the said house has become unstable and insecure and misshapen, and is constantly becoming more so, and that the said house will soon be totally unsafe and unfit for occupation.

V. That there is no way in which the said house can be made safe and fit for occupation except at great expense, and that the damages to defendant by the negligence and fault of the plaintiffs in the construction of the said house are $30,000 Mexican.

By way of a second counterclaim against the plaintiffs, defendant alleges:

I. That on the 20th day of June, 1901, plaintiffs contracted with defendant in writing to fill a certain lot on the bank of the Pasig river with earth and sand at the rate of $1.30 Mexican currency per cubic meter, a copy of which contract is hereto attached marked Exhibit D and is made a part hereof.

II. That plaintiffs filled the said lot with sand and earth and

represented to defendant that the amount of sand and earth used in such filling was 62,690.50 cubic meters; that the defendant, relying upon said representation and upon the superior knowledge and supposed good faith of plaintiffs, has paid plaintiffs $81,497.65 Mexican currency for said filling, or $1.30 Mexican currency per cubic meter for 62,690.50 cubic meters.

III. That the total amount of sand and earth actually deposited on the said lot by plaintiffs was 31,000 cubic meters, as plaintiffs well knew.

IV. That defendant has demanded of plaintiffs the repayment of $41,197.63 Mexican currency, the difference between the amount paid plaintiffs and the amount actually due, as alleged, and that plaintiffs have refused and refuse to pay said sum.

Wherefore, defendant prays judgment against the plaintiffs for $71,197.65 Mexican currency, to wit: $30,000 Mexican currency on the first counterclaim and $41,197.65 Mexican currency on the second counterclaim, together with the costs of this action, and such other and further relief as may be deemed equitable.

(S'g'd) PILLSBURY & SUTRO,
Attorneys for Defendants."

8 EXHIBIT A2.

"Statement of terms and conditions governing the construction of a house of strong materials upon certain premises situated on Calle Malacañan, District of San Miguel, its owners being Behn, Meyer & Co.

1. The house shall have a frontage of 24 yards by 20 in depth and 7½ in height.

2. The foundations shall be of ordinary stone of Guadalupe, and shall be 100 m. by 100 m. in depth, with piers 1.00 m. by 0.60 m. wide. The masonry of the lower story shall be of that class of stone ordinarily called Guadalupe 0.16 m.

3. The stanchions or supports shall be made of Apitong, Macasim, or Amoguis wood, with scantlings 0.20 by 0.20 m. The framework, roof, cross-beams, angle rafters, sockets, king-posts, props, and partition framework shall be constructed of Apitong, Macasim, or Amoguis; the scantlings of the props shall be 0.12 m. by 0.07 m.

4. The partitions of the principal story or floor shall be of boards made of the above mentioned wood ½ inch thick. The boards for the floor of the principal story shall be all of Amoguis or Tagili.

5. The windows shall be of shells of the country. The doors of the rooms of the principal story and the out-houses of the ground floor shall be of Macasim or Apitong, and the balconies of the gallery shall be of wood of a like class.

6. The principal staircase shall have a width of 1.40 m., with banisters and balustrades 0.05 m. by 0.05 m., and another servants' staircase 0.05 m. wide and made of second-class wood.

7. The painting of the entire exterior shall be in oil and the entire interior of whiting, except the doors, which shall be varnished.

Manila June 30, 1901.

(Signed) CAMPBELL & GO TOA."

EXHIBIT B.

"MANILA, *February* 25, 1902.

Messrs. Behn, Meyer & Co., Calle Anloague, Addressed.

DEAR SIRS: The work which I have in progress at Uli-Uli
9 is as follows:

Sand filling for which a price is fixed.
Construction of dwelling-house, price fixed.
Construction of entrance stairs and balcony, price fixed.
Construction of foundation stone wall, price fixed.
Plumbing, price fixed.
Stable as per original plan, price, fixed.

The price for painting with carbolineum, and hanging roofing paper, etc., will be about $400 Mex., the amount of cost to us.

Truly yours,

(Signed) O. F. CAMPBELL."

EXHIBIT C.

"MANILA, *February* 25, 1902.

O. F. Campbell, Esq., P. O. Box 389, Manila, P. I.

DEAR SIR: We hereby confirm our verbal arrangement, viz.: to pay you the sum of $400 Mex. for roofing paper and carbolineum paint and work connected therewith, supplied to the house at Uli-Uli.

We further confirm the purchase of two iron spiral staircases at $200, each, for the bathrooms. The price includes cost for painting, fixing, etc.

We, are, Dear Sir,

Yours truly,

(Signed) BEHN, MEYER & CO."

EXHIBIT D.

"MANILA, P. I., *June* 20, 1901.

"We, Campbell & Go-Taoco, hereby agree to and with Behn, Meyer & Co., city of Manila, upon their signed acceptance, to fill up a certain lot lying on the bank of the Pasig river, next to Malacañan Palace, with suitable filling composed of earth and sand of good quality, at the rate of One Dollar and thirty cents ($1.30) Mexican currency per cubic meter. Material will be measured in whatever way the said Campbell & Go-Taoco—with the approval of

Behn, Meyer & Co.—deem most expedient, then spread evenly over the ground to bring the lot to a certain level, which level will be determined by Behn, Meyer & Co. The amount to be furnished will be over 15,000 (fifteen thousand) cubic meters, and delivered at the rate of five thousand cubic meters monthly, unless some unforeseen cause, as storms, etc., make it impossible.

Accepted.

(Signed) BEHN, MEYER & CO."

Contractors, GO TOACO,
O. F. CAMPBELL."

10 To the counterclaim of defendants, the plaintiffs filed the following answer:

"Now come the plaintiffs, and, in answer to counterclaim of defendant,

Regarding the First Counterclaim:

Deny the allegations therein set forth.

Regarding the second Counterclaim:

I. Admit the allegations of the first section.

II. Admit that the plaintiffs filled the said lot with sand and earth, and that defendant has paid plaintiffs $81,497.65, Mexican currency, for 62,690.50 cubic metres of filling, and deny all other allegations contained in the second section.

Plaintiffs further allege that the plaintiffs have delivered 64,444 cubic metres of earth and sand, for which they are entitled to receive the sum of $83,777.20, Mexican currency, in accordance with the terms of the contract; and that there is now due from defendants the sum of $2279.55, Mexican currency, on said contract.

III. Deny each and every allegation contained in the third section.

IV. Deny each and every allegation in the fourth, except that plaintiffs have refused and still refuse to pay any sum to said defendants.

Wherefore, plaintiffs pray judgment against defendant in the further sum of $2279.55, Mexican currency, on the second counterclaim, and for such further relief as may be equitable.

(Signed) WILLIAM TUTHERLEY,
Attorney for Plaintiffs."

Manila, 12/18/02.

On May 28, 1903, the defendants filed the following amended answer:

"Comes now the defendant in the above entitled action and by leave of the court files this his amended answer:

I.

Paragraph 5 of the first counterclaim in defendant's original answer is amended to read as follows: "That there is no way by which the said house can be made safe and fit for occupation except at great expense to the defendant, to wit, at the cost of thirteen thou-

sand dollars ($13,000) local currency; and that the defendant has suffered great damage by reason of the negligent and faulty construction of the said house, to wit, the sum of thirteen thousand dollars ($13,000) local currency.

11 II.

Paragraph 3 of the second counter-claim in defendant's answer is amended to read as follows: "That the total amount of sand and earth actually deposited on said lot by plaintiffs was twenty thousand nine hundred and thierty-five (20,935) cubic meters."

III.

Paragraph 4 of the second counterclaim in defendant's answer is amended to read as follows: "Defendant has demanded of the plaintiffs repayment of the sum of fifty-four thousand two hundred and seventy-five dollars ($54,275.00) local currency, which has been over-paid to the said plaintiffs, and which the said plaintiffs had and received to the benefit of said defendant, and plaintiffs have refused and still refuse to pay the same."

IV.

The prayer of the defendant's answer is amended to read as follows: "Wherefore, defendant prays judgment against the plaintiff for the sum of sixty-seven thousand two hundred and seventy-five dollars ($67,275.00) local currency, as follows, to wit: thirteen thousand dollars ($13,000) local currency for damage sustained by reason of the negligent and faulty construction of defendant's property, and fifty-four thousand two hundred and seventy-five dollars ($54,275.00) local currency, money had and received by the plaintiffs to the use and benefit of the defendants, together with his costs about his suit in their behalf expended, and defendant prays for such other, further, and general relief as to the court may seem meet.

(Signed) PILLSBURY & SUTRO,
Attorneys for Defendant."

The trial of this cause was begun on June 15, 1903, and ended July 8, 1903, with the following judgment rendered by the court:

"The court finds in this case that on the 20th of June, 1901, the plaintiffs and defendants entered into a written contract by which the plaintiffs obligated themselves to construct for the defendants a house on a certain lot on the Pasig river, near Malacañan Palace: the dwelling-house at the price of $13,000; water system, kitchens, baths, and closets, $500; and stables, $1500; all the above sums being in Mexican currency.

The plaintiffs made this contract a part of their complaint, and allege that defendants owe them on this contract the sum of $1500; and further allege that defendants, on various dates since June 20, 1901, contracted with them verbally or by correspondence
12 for alterations and improvements to the building, to wit: December 28, 1901, to the amount of $4,000; and in the

eighth paragraph the plaintiffs allege that they, at the request of the defendants, further made a variety of changes, alterations, and improvements in and to said premises outside of the contractual obligations, to the value of $2,333.12; all the above sums being in Mexican currency.

While all of the items are nowhere aggregated in the complaint, they do aggregate $22,750.62. The plaintiffs admit payment by the defendants of $13,500, and pray for judgment for $9,250.62, with interest, the above sums being in Mexican currency.

The defendants admit the contract of $13,000 for the construction of the house, $500 for the water system, etc., and $1500 for construction of stables, making a total of $15,000, and also an additional contract of December 28, 1901, of $4,000, aggregating $19,000, above sums being in Mexican currency.

The defendants file a counterclaim, in which they allege that the work was not done by the plaintiffs in a workmanlike manner, and set out specifically, in five paragraphs, the unskillful and unworkmanlike manner in which this work was constructed by the plaintiffs. And, in addition to the alleged damages to the defendants on account of breach of contract on the part of the plaintiffs in the construction of the buildings, etc., the defendants charge that they made a contract with the plaintiffs on June 20, 1901, to fill with dirt and sand the lot on which this building was constructed, at the price of $1.30 per cubic meter, and that the plaintiffs represented to them that they had used 62,690.50 cubic meters of earth and sand in filling said lot, for which defendants paid them $81,497.65, when in fact 31,000 cubic meters were actually used, making an overpayment of $41,197.65. After this the defendants amend their cross-complaint so as to charge that plaintiffs only used 20,935 cubic meters of earth and sand in filling the said lot. In replying to this, the plaintiffs admit that they filled the lot with earth and sand, for which defendants paid them $81,497.65, for 62,690.50 cubic meters of earth and sand, as alleged in defendants' cross-complaint; and plaintiffs set up, in their answer to defendants' cross-complaint, that they used 64,444 cubic meters, making a difference in money of $2,279.55, for which they pray judgment in addition to the demand in the original complaint. All the above sums of money are in Mexican currency.

The onus is on the plaintiffs to establish the allegations in the original complaint, and also the amount claimed on account of the excess sand and dirt used in filling, set up in their answer to the cross-complaint of defendants, and on defendants to establish their counterclaim. The defendants admit that there remains unpaid on the contract price of construction the sum of $6,732, the payment of which was withheld, as damages, on account of the faulty construction of the work.

The defendants introduced Major J. F. Case, who shows himself to be an expert civil engineer and of learning in architecture and building, and Robert M. Loper, who shows that he is an expert in mechanical engineering. These are both men of a high order
13 of intelligence and learning in engineering and mechanics. They both made a thorough investigation of this building,

and their evidence, together with the other facts and circumstances in this record, clearly establishes that the building in question was not constructed according to the contract; that the foundation is so constructed that the center of the building, where the great weight is, has settled much more than the outer support, and that causes the water that falls on the porches and outer parts of the building to run in on the floors of the rooms. From the proof, the plaintiffs must have entrusted this work to a lot of unskillful, careless men as carpenters, without any attention from the plaintiffs. The preponderance of the evidence is that it will cost to put this property in a condition to comply with the plans and specifications and contracted alterations 62½% of the contract price.

On the issue of filling the lot of defendants in question, it is clear that this lot was formerly used for the cultivation of rice and grass, known as a rice paddy. It was divided into four equal squares by fills of earth across the entire lot, and the entire lot was practically level, with the exception of the fills mentioned, the lot being slightly elevated near the Pasig river. The two witnesses, Major Case and Robert F. Loper, separately, and at different times and different places, dug six holes, each down to the bottom of the dirt and sand filling, measuring the depth of filling and then measuring the area of the lot. They thus made a calculation of the cubic meters of sand and dirt used in filling this lot, and, allowing 15% for settling, which was added to the cubic meter area of 16,549.62, the result was 20,935.27 cubic meters of material used by plaintiffs in making this fill, there being the slight difference between the two witnesses of 30 cubic meters. They both say that 15% is a liberal allowance for shrinkage. The plaintiffs were paid by defendants for 62,690.50 cubic meters. According to these witnesses, the defendants paid plaintiffs for 41,752.53 cubic meters of sand and dirt at the rate of $1.30 per cubic meter, more than the plaintiffs put upon said lot.

The plaintiffs attempted to rebut this evidence by three or four witnesses. Taking them together, their manner of testifying, their intelligence, and their apparent knowledge of the matters about which they spoke, their evidence was without much weight. One of these witnesses, Vicente Pastor, who claimed to be a civil engineer, showed himself to be what is known in the books as a swift witness, and did not impress the court as an expert, nor did he show that he had made such observations, measurements, and calculations as would entitle his evidence to much weight.

To my mind, it is conclusively shown that not more than 21,000 cubic meters of filling was placed by the plaintiffs on this lot. This is corroborated in part by the latter part of the filling contract, which appears in the record as Plaintiffs' Exhibit B., on page 30, which reads: 'Amount to be furnished will be over 15,000 cubic meters.'

This indicates to me that it was in the mind of the contracting parties, at the ti-e, that the amount of filling would not be
14 very far in excess of 15,000 cubic meters.

I have concluded that an equitable adjustment of this matter is to deny the plaintiffs any other compensation than they have already received, because of their breach of contract in so defectively

constructing the improvements of the defendants; and that defendants are entitled to at least the unpaid balance as damages sustained by them on account of the manner in which these improvements were constructed by the plaintiffs.

I am further satisfied that the defendants paid plaintiffs $1.30 per cubic meter for at least 40,000 cubic meters of sand and dirt, as filling for their lot, that was not put thereon by plaintiffs, which amounts in the aggregate to $52,000 Mexican currency.

It is therefore ordered and adjudged by the court that the plaintiffs' complaint be dismissed and that defendants recover of the plaintiffs the said sum of $52,000 Mexican currency, and the costs of this case, for which execution may issue.

July 8, 1903.

(Signed) JOHN C. SWEENEY, *Judge.*

To this judgment plaintiffs entered an exception in due form and at the proper time, and filed the following petition for a new trial, which petition was heard and denied by the court on the 6th day of August, 1903, to which decision plaintiffs likewise excepted, at the same time notifying the court of their intention to prepare, perfect, etc., a bill of exceptions in appeal:

"Appear now the plaintiffs, and move the court that the case be reopened, for the reason that the findings of fact upon which the court bases its judgment are clearly and manifestly against the preponderance of the evidence, in the following respects:

1. That the building is not constructed in accordance with the terms of the contract.

2. That the preponderance of evidence shows that it will cost sixty-two and a half per cent., or some other sum, to place the house in a condition to conform to the plans, specifications, and alterations contracted for.

3. That it is proved that plaintiffs have not contributed more than 21,000 cubic meters of sand in filling in the premises in question.

15 4. The court did not take into account at all the following facts, which it should have considered, inasmuch as they clearly appear in the record:

(*a*) That the defendants expressly admit that they do not contend that the plans and specifications have not been complied with.

(*b*) That no provision or specification of the contract has been pointed out that has not been complied with.

(*c*) That the defendants, through their own agents, measured and received the sand as the same was delivered, without there being any allegation or proof that error was committed.

(*d*) That the house was erected under the personal supervision and in accordance with the instructions of inspecting engineers appointed by the defendants.

5. There is no proof whatsoever in the record that the payment made by defendants to plaintiffs for the 40,000 cubic meters of sand, as found in the judgment, was made through error.

6. That there is no allegation nor any proof which establishes

that the sand paid for by defendants was not delivered by plaintiffs.

7. They also ask the reopening of the case for the following reasons:

That the court committed several errors of law to the prejudice of plaintiffs, and that the judgment is contrary to law.

That the trial was not equally just and impartial as regards plaintiffs and defendants."

16 In answer to the foregoing application, the defendants filed the following affidavits:

"Thomas Colston Kinney, being duly sworn, appears and deposes:

That he is a member of the firm of Pillsbury & Sutro, the attorneys representing the defendants Messrs. Behn, Meyer & Co. in the above entitled cause; that both before and since the date upon which judgment was rendered, he made and has made inquiries respecting the solvency of the plaintiffs Messrs. Campbell & Go-Tauco, and that the information which he has received in the matter leads him to believe positively the following: That the plaintiff, Mr. O. F. Campbell, possesses very little, if any, property upon which this judgment may be executed; and that the plaintiff, Go-Tauco, as deponent believes, considering his personal conditions, though it is true that he is actually in possession of property upon which this said judgment may be executed, would not hesitate, were the occasion to present itself, to dispose of his property in order to avoid the execution of the judgment.

The deponent further states that he firmly believes that unless the court at once issue execution upon the judgment, the rights of the defendants will be greatly prejudiced, if not rendered absolutely null and of no effect.

And further the deponent saith not."

"Arnold Dittmar, being duly sworn, appears and deposes:

That he is over the age of majority, a resident of Manila, and a partner in the firm of Behn, Meyer & Co., the defendants in the above entitled cause.

That from the investigations which he has made, and by reason of the personal business relations which he has carried on with the two plaintiffs Messrs. O. F. Campbell and Machuca Go-Tauco, he firmly believes that Campbell possesses very little, if any, property upon which the judgment rendered in this matter may be executed, and that, considering the personal conditions of the plaintiff Go-Tauco, the latter, although at present in possession of property upon which the judgment rendered in favor of deponent might be executed, would nevertheless be capable of disposing of it, if given sufficient time to do so, rendering it impossible for deponent to recover the sum granted him by the judgment, either by means of the execution of such judgment or in any other manner.

Deponent further states that he sincerely believes that unless the court at once orders that an execution issue upon the judgment

rendered in this matter, it will be impossible for them to recover the amount in said judgment set forth.

And further deponent saith not."

In answer to these affidavits, plaintiffs filed the affidavit of
17 the plaintiff, Go Tauco, which is as follows:

"Before the undersigned authority appears R. M. Go Tauco, one of the plaintiffs in the above entitled cause, who, having been duly sworn, deposes as follows:

That he possesses in the Philippine Islands, subject to execution, the following property:

	Mex.
1. A saw-mill situated in Manila, Calle Reina Regente, Binondo, value	$150,000.00
2. A property, with building, on Calle Lemery, Tondo, Manila, value	24,000.00
3. A house built upon the property of another on Calle Benavides, Trozo, Manila, value	40,000.00
4. A building upon the property of another, used in the making of boards, value	20,000.00
5. A property on Calle Lardizabal, Sampaloc, Manila, value	2,000.00
6. A house and property on Calle Lacoste, Santa Cruz, value	30,000.00

That the said properties numbered 1 and 6, respectively, are mortgaged for $25,000 and $20,000, debts which will be due in 1904.

That, although he has other debts, he also has other property, not mentioned here, and of more than sufficient value to discharge such debts.

That he has not disposed, nor does he intend to dispose, of his property in order to avoid payment of the sum mentioned in the judgment rendered against him, and that, in the event of such judgment being confirmed, such payment will be made, for which purpose the deponent will reserve and put aside sufficient property for said payment.

And further deponent saith not, except to add that the values above set forth are just.

In the Court of First Instance of Manila.

Civil Cause No. 1181.

O. F. CAMPBELL, Plaintiff,

vs.

BEHN, MEYER & Co., Defendants.

The trial of this cause having been set in accordance with the petition filed by plaintiff, against whom the judgment entered in

this matter was rendered, praying that the execution of said judgment be suspended and in view of the affidavits filed by the
18 defendants, through their attorney, and subscribed by Messrs. T. C. Kinney and Arnold Dittmar, respectively, praying at the same time that the court issue a special order for the execution of the judgment; and in view of the affidavit filed in opposition thereto by Mr. R. M. Go-Tauco.

The court decides that, according to the provisions of Art. 144 of the Code of Civil Procedure, it is not proper to consider the affidavits filed in opposition, and, therefore, the court will not consider the affidavit filed and sworn to by Mr. R. M. Go-Tauco, for the reason that the provisions of the law referred to require that there shall be submitted to the court reasons sufficient, in the opinion of the court, to authorize the issuance of a special order for the execution of the judgment.

The court decides, further, that the affidavits of the said Messrs. Kinney and Dittmar show a state of facts which authorizes the court to issue the special order for execution in question, which said order has not yet been issued, unless that clause of the judgment which reads "and let execution issue"—a clause which is usual and current in civil matters—should be interpreted to constitute the special order in question.

And I, therefore, adjudge, order, and decree that the writ of execution which the sheriff now has in his hands be carried out and the judgment entered in this cause be executed."

Whereupon, the attorneys for plaintiffs asked the court to set forth his reasons for issuing the special order of execution before the lapse of the time fixed by law.

"The court decides that its reasons for its action have already been set forth, and, therefore, refuses to give further reasons."

To this decision the representatives of plaintiffs excepted.

Manila, P. I., July 15, 1903.

(Signed) JOHN C. SWEENEY, *Judge.*"

The plaintiffs excepted to the decision of the court in refusing to consider the affidavit of Go-Tauco, and also protested against the immediate issuance of another writ of execution, at the same time taking an appeal to the Supreme Court.

19 The following is the evidence introduced by both parties at the trial, with the exceptions taken and which do not appear elsewhere in the record:

O. F. CAMPBELL, a witness called on behalf of the plaintiffs, being first duly sworn testified as follows:

By Mr. CHICOTE:

Q. What is your name?
A. O. F. Campbell.
Q. What is your occupation?
A. Contractor.
Q. What is your address?

A. My office or my residence?
Q. Both?
A. My office is 106 Calle Reina Regente.
Q. Did you ever contract with Behn, Meyer & Co. to do certain work for them?
A. Yes, sir.
Q. Will you state what work that was? What was the nature of the contract?
A. We had many contracts with them.
Q. Did you have a contract with defendants about the construction of a dwelling-house on a piece of land in Calle Uli-Uli?
A. Yes, sir.
Q. Were the conditions and specifications of the contract written or verbal?
A. Yes, sir, they were written.
Q. I will now hand you these papers and ask you to state whether or not these are the specifications and the contract referred to?
A. This is the contract of the house and specifications of the house and the addition to the house.

Mr. CHICOTE: I offer them in evidence.
Mr. KINNEY: No objection.
(Received in evidence and marked Plaintiffs' Exhibits A, B, and C, respectively, June 15th, 1903.)

Q. I will now hand you three photographs, Mr. Campbell, and ask you to state what they are.
A. This is a front view of the dwelling-house, showing
20 the addition (marked Plaintiffs' Exhibit D). This is a view of a front and side view taken from a private street (marked Exhibit E), and this is a rear and side view taken from the river side, marked Exhibit F.

Mr. CHICOTE: I offer them in evidence.
Mr. KINNEY: No objection. We are very glad to have them.
(Received in evidence as Exhibits D., E., and F. respectively.)

Q. During the course of construction, was any man employed there as superintendent? Was the work supervised by anybody?
A. The work was supervised by an engineer by the name of Duff and afterwards by an engineer named Cook, during the entire work.
Q. Do you know who employed these gentlemen?
A. They were representatives of Behn, Meyer & Co.
Q. Did you have to follow all the instructions of the engineers in charge of the work or could you do the work in any way you pleased?
A. No, we were not allowed to do that. The engineers were there daily and every few days directing the work as it went along.
Q. The specifications and contracts and the plan of this work, were they at any time altered?
A. There were a great many additions and a great many alterations, yes, sir.

Q. Do you know why these alterations were made in the specifications and contract?

A. They were made to improve the work and make the changes that Mr. Cottencamps wished in the house.

Q. Were these alterations agreed to be made at one time or several occasions?

A. From time to time as the work progressed.

Q. As the contractors of this work, did you make delivery
21 of this building to Behn, Meyer & Co.?

A. Yes, sir.

Q. Will you state when you made this delivery?

A. I think it was about the first of May, a little bit more or less.

Q. Of this year?

A. Of the last year, and they, I believe, entered the house about the 10th or the 12th day of May of last year.

By the COURT:

Q. You mean they took charge of it, moved into it?

A. They moved into it the last of May, 1902, a little over a year ago.

By Mr. CHICOTE:

Q. Were you paid in full for this work?

A. No, sir.

Q. Is there any amount due you on account of this work?

A. Yes, sir, on the house there is about $9,000 Mexican, in round numbers.

Q. Is there any other sum due you now?

A. There is an amount due on the sand contract of about $2,000 or more, and there are some bills that we have never presented for work outside of this contract out at Uli-Uli.

Q. Did you also make a contract with defendant company to fill up the lot on which this house was built?

A. Yes, sir.

Q. Do you know how many cubic meters of sand were furnished by you for this work?

A. About 62,000 cubic metres.

Q. And was this number of cubic meters of sand actually used for this work?

A. Yes, sir.

Q. And was the payment for this sand agreed upon between you and Behn, Meyer & Company? How were you to be paid by Behn, Meyer & Company for this sand?

The COURT: Is this in writing?

Mr. KINNEY: It is in writing. I have no objection. As stated before, I know better, but I have no objection to going into
22 it as it is.

A. The receipts were given daily, and at the end of each week, we rendered duplicate bills which were O. K.'d by the manager of the firm, and then presented for payment weekly.

Q. Who gave these receipts daily, as stated by you?
A. An authorized representative of Behn, Meyer & Company.
Q. And was this authorized representative of Behn, Meyer & Company there all the time to receive the sand?
A. Constantly; in fact, he lived there on the ground.
Q. Were you paid by Behn, Meyer & Company for furnishing this 62,000 cubic metres of sand?
A. We were paid all except the last four receipts which they have not as yet paid.
Q. You were always paid according to the amount of the receipts, were you not?
A. I was always paid—made my bills—from the receipts given to me during the week.
Q. Before payment, would they examine the bills or receipts or any other papers?
A. I always furnished the receipts with the bills, and they looked over the receipts, and they had also their own book which they always went over, and the two books always correspond—at least the receipts and their books were the same. In case there was any discrepancy in the matter of a tenth of a meter, it was always arranged right at that moment before the bill was O. K.'d by the manager.

By the COURT:

Q. Whose book is that you are talking about?
A. The book of their authorized representative to receive the same.
Q. The man on the ground?
A. The man on the ground. And each week he turned in his book before I rendered my bills.

By Mr. CHICOTE:

Q. Did you see that land before it was filled up?
A. Yes, sir.
23 Q. What kind of land was that? Was it a rough piece of land?
A. The land was covered with very deel ditches and in parts was a paddy field and in other parts was a swamp where the people fished and watered the carabaos.
Q. The sand, before it was deposited on this lot, was it measured?
A. The sand was measured before it was put upon the land, yes, sir.
Q. Who used to measure it?
A. It was measured by the representative of Behn, Meyer & Company.

Cross-examined by COUNSEL FOR DEFENDANTS:

By Mr. KINNEY:

Q. Mr. Campbell, when did you begin this work?
A. Which work is that to which you refer?
Q. The work on the house?

A. I can't say the exact date; I believe the building permit was in August but we had to fill in certain parts of the ground in order to bring in materials. I think it was in September.

Q. Not later than September you began it?

A. Well, I can't say that exactly.

Q. How close can you fix the date of beginning the building?

A. I don't think it was later than the end of September.

Q. You said that an engineer or architect was always in charge of the building for Behn, Meyer & Company, did you say that?

A. Yes, sir.

Q. When did Mr. Duff who you said was one of them begin his work as the supervisor of that building for Behn, Meyer & Company?

A. He began when he ordered the change of those posts. It was shortly after we had commenced the work on the building that Mr. Duff came out there and first gave us levels for the sand, and afterwards went over the house and made the modifications that
24 he deemed necessary in regard to the foundations and the posts.

Q. So the house was up when Mr. Duff first came?

A. It was not up.

Q. Well, how could he go over the house? You previously stated that Mr. Duff came out there and went over the house and gave you the modifications that he wished made. Now, how, far had the house progressed in construction when Mr. Duff came out there?—And I would suggest, Mr. Campbell, that, as my questions have to be translated to Mr. Chicote, you perhaps had better wait long enough to see whether he wants to object to them before you answer.

A. Yes, sir.

Q. At what stage, Mr. Campbell, was the house when Mr. Duff first appeared on the scene?

A. I think, as I remember, that some of the posts were up and some of the joists and tie-beams were already on.

Q. Was the house in condition for him to go over it?

A. Yes, sir. We went up on the ladder and went over these joists and looked at the timber.

Q. How long was Mr. Duff in charge?

A. (Looking at a paper.) I have here a note I received from him about another matter on the 24th of January, 1902. That is probably the last communication I received from him: the latter part of January.

Q. Do you know whether or not Mr. Duff was ill in the hospital at some time before he died?

A. He died very suddenly, as I remember.

Q. You don't know?

(No answer.)

Q. How long was it from the time you last saw Mr. Duff on the Behn, Meyer property to his death?

A. Mr. Duff had charge of the work until Mr. Cook took his place, as near as I know. I don't remember how many times I
25 saw him on the work.

Q. I would be glad if you would answer my question:

How long was it from the last time you saw Mr. Duff on the Behn, Meyer Company work to the time of his death?

A. I cannot say. The man went to the hospital and soon afterwards died.

Q. Well, -as it one day, two days, ten days, or a month?

A. If I remember Mr. Duff's death, he was ill for sometime. He made inspections on the work and shortly after was taken sick with dysentery, I think, and went to the hospital and died.

Q. Well, would you say that it was one week that he had not been on the work before he died?

A. Possibly a week.

Q. Possibly two weeks?

A. I don't know.

Q. You don't know—or what was your answer?

A. I do not remember.

Q. Three weeks?

A. I don't remember.

By the COURT:

Q. Have you no recollection about it?

A. No, sir, he got sick, and after making inspections he complained many times out there. I don't remember.

By Mr. KINNEY:

Q. Now, Mr. Campbell, you have a number of items here in your complaint which amount to $2,333.12. The first item is a stone wall about the house, 25 meters at $16, $400. Is it not a fact that you were specifically instructed by Behn, Meyer & Company not to build that wall? And before answering the question I will call your attention to what we will allege to be a copy of a letter written to you on January 13, 1901, and ask you if you ever received that letter?

A. As I remember, I received a latter of which this would
26 be a fair copy.

Q. Well, does not that letter tell you that he does not want the wall built?

A. Mr. Ditmar told me——

Mr. CHICOTE: The letter will show for itself.

The COURT: The objection is well taken. I sustain the objection on the ground that the letter will show for itself.

Q. Were you instructed, Mr. Campbell, by Behn, Meyer & Company not to build that wall?

A. Nothing more than the letter.

Q. "Fifteen doors changed from third group to superior group, with glass, at $35, $525." How did that change happen to be made?

A. It was done through the order of Mr. Duff and Mr. Cottoncamps.

Mr. KINNEY: I will have to ask that as Mr. Duff is dead, unless he can prove the conversation with Mr. Duff otherwise than by his

own statement, that all the statements of Mr. Duff's orders be stricken out.

The COURT: I direct the stenographer to strike that out, what Duff may have said with reference to the 15 doors changed from third group to superior group with glass. Does the contract show the third group and superior group? Is it so set out in the contract? Where do we get the meaning of that term?

Mr. KINNEY: The third group means one of several groups of timber in the Philippine Islands. One is called the first group and contained a certain grade and then there are other groups of an inferior grade.

The COURT: Well, I hold that these engineers who were put there to superintend that work and to see that it was in accordance with the contract between the parties, that if there is any change proven, that it cannot be done by proving the declarations by Mr.
27 Duff, but the proof must go to the point that these parties authorized them specifically to make the change.

Mr. CHICOTE: It was shown, if your Honor please, that Mr. Duff was put there by these defendants and that he was authorized as engineer to superintend the work.

The COURT: I understand, so far as the testimony has gone, that he was put there as an engineer to see that the work was constructed according to the plans and specifications and contract made between the parties and that he was not put there for the purpose of making a contract for the party.

Mr. CHICOTE: To which ruling of the court I take an exception.

By Mr. KINNEY:

Q. (Continuing to read from complaint.) "19 louvered transoms at $20, $380." Why, Mr. Campbell, did you charge Behn, Meyer & Company with that item?

A. Because in the presence of Mr. Machuca and myself Mr. Cottencamps ordered it done.

Q. At what date, Mr. Campbell, was that ordered to be done?

A. I cannot remember.

Q. As near as you can?

A. I should judge possibly in November, 1901.

By the COURT:

Q. Who was Mr. Cottencamps?

Mr. KINNEY: He was the predecessor as the manager of Mr. Ditmar of Behn, Meyer & Co.

The WITNESS: He is the signer of the contract of the house.

By Mr. KINNEY:

Q. What was that contract, Mr. Campbell, with reference to the 19 transoms? How had the specifications been before in that connection?

A. There was nothing whatsoever in the specifications about them.

28 Q. There were not to be any transoms in the house?
A. No, sir.
Q. Were there to be any places for transoms?
A. The plan will show it.
Q. (Handing witness a blue print.) First look at that, and say whether the plans call for transom holes or whatever they would be known as?
A. It calls for a panel.
Q. Does that call for any holes for transoms to be put in?
A. No, sir, we put in panels according to the plans, and they were removed to permit of the louvres.
Q. (Reading.) "2 bath tubs at $40, $80." How did you make that change?
A. They were ordered by Mr. Cook from Mr. Go Toaco.
Q. Is it not a matter of fact, Mr. Campbell, that you were under a contract to build two bath tubs in the house, and that the bath tubs were so constructed that they couldn't be used and that you put these bath tubs in to square the matter?
A. No, sir. There are no baths in the specifications or contract.
Q. This contract which you introduced here says, "For installing a water system to stable, kitchen, baths, and water closets and drain tubes from same, $500 Mexican currency are agreed upon." Now, didn't you build two bath tubs in that house?
A. No, sir, that is, they are not tubs. We built a protection for the water in using the shower bath.
Q. Hasn't it tiles at the bottom and all around the sides and a hole in the center for the water to run out?
A. Yes, sir.
Q. Was that part of your contract?
A. No, sir.
29 Q. That was just gratuitous to Behn, Meyer & Company? Did you make them a present of those two bath tubs without having any contract to do it?
A. They were put in there——
Q. Well, I say, did you make them a present of them? Was that a gratuity to them or was it under contract?
A. I put them in there. I didn't make any present of them, no, sir. I merely put them in there to make the work complete.
Q. Now, didn't Mr. Duff or Mr. Cook or somebody in charge of that house complain that those tubs could not be used, and didn't you furnish these two tubs that you now charge $80 for to settle up that matter of these two tubs that you had to put in there being worthless and useless?
A. In regard to these bath tubs, they don't call for any bath tubs in the contract at all, and so we are merely talking about something that is outside of the contract altogether.
Q. The court will decide that, sir, with all due respect to your judgment in the matter. If you will answer my question: Wasn't there an objection made on the part of Mr. Cook to the construction of the two bath tubs which you did put in, and did you not send these two tubs for which you now charge $80, as a method of

straightening up the objection which Mr. Cook or Mr. Duff had raised to those two tubs?

A. I never had any conversation with Mr. Cook on the subject that I remember of, but he ordered two bath tubs made and sent out there.

Q. How do you know that he ordered two bath tubs made and sent out there?

A. Through the records that were sent into my office.

30 Mr. KINNEY: I ask that his answer about Mr. Cook's having ordered two bath tubs be stricken out.

The COURT: Wasn't Mr. Cook acting as agent?

Mr. KINNEY: Well, he says that the records in their office showed it. That is not the way to prove it.

The COURT: I sustain that objection. Strike that out.

Q. (Reading.) "Galvanized iron wall, wood studding for spiral stairs, $160.00" How does that charge happen to be made, Mr. Campbell?

A. Through an order of Mr. Cook and also Mr. Ditmar.

Q. What was that order?

A. Verbal.

Q. When was it given?

A. Shortly before the completion of the house.

Q. Did Mr. Ditmar ever write you a letter in which he said that nothing would be paid for that you did not have an order for?

A. I don't remember.

Q. As a matter of fact, Mr. Campbell, isn't it true that the original agreement provided for wooden stairs to go down to these bath rooms?

A. I don't know; the plans would show that.

Q. Well, then, to refresh your memory: As a matter of fact, didn't it provide for wooden stairs to go down and subsequently Mr. Ditmar said that he wanted the spiral staircases and you quoted those to him at $200 each and they were put in instead of the wooden staircases?

A. If the wooden stairs are shown on the plan—I don't remember whether they are or not—the iron stairs were put in to connect with these baths; and the difference in price, or the price of the stairs, as quoted at that time, accepted and paid for by Behn, Meyer & Company, the stairs themselves alone.

Q. Well, now, if you will answer my questions, it will save
31 a lot of time. Didn't you contract to put those stairs down there for $200 each in place of the wooden stairs? If you will just answer that yes or no or that you don't know, we will save a good deal of time.

A. Well, just as an explanation in answering the question, it is all detailed work and it is impossible to say yes or not. It is all in my record. If I have my letters and things there I can say so. As I remember it, Mr. Kinney, I gave the prices for two iron spiral stair cases a piece and that settled the matter of the stair cases, and I think the price which you gave.

Q. (Reading) "Double doors below on river side, $65.00." Why that item?

A. Because it is not called for on the plans and specifications.

Q. The plans and specifications don't call for doors?

A. On the lower floor, that door.

Q. Does it call for the others?

A. I don't know.

Q. Well, why don't you know? You say it don't call for this one here. Why don't you know whether the plans and specifications call for other doors? Was the house to have any doors at all?

A. I don't think it calls for any doors on the lower floor whatsoever. (Looking at the specifications) It only calls for one entrance door.

Q. Doesn't 5A there represent the doors of the dwelling on the principal floor and of the by-rooms on the ground floor which were to be of Macasin or Apitong wood and the balustrades of the gallery of the same kind of wood?

The COURT: Does that pertain to the 6th item there, the double floors below on river side? Does that question pertain to that?

Mr. KINNEY: Yes, sir.

32 The WITNESS: There is nothing here of that kind.

Q. 5-A of "Conditions." The windows will be shell windows, known as ventanas de conchas del pais." Isn't that on your specifications there?

A. No, there is nothing on it like that.

Q. What is this, Mr. Campbell? (Handing witness specifications.)

A. Those account for the door posts.

Q. Just read to the court what that says?

A. (Translator reads) Exterior and interior frame doors built with lumber of third class.

WITNESS (to translator): And then continue on with how many doors.

TRANSLATOR: Eleven; that is the number of them.

Q. (Reading) "2 windows lower at $30." What are they?

A. They are the two windows that are on each side of this door just spoken of.

Q. (Reading) "$373.12 for drain pipes, 46.45 linear meters, at $8.00." Why that charge?

A. That charge was made through an order of Mr. Cook to Mr. Go Taoco.

Q. Didn't you contract for installing water system to stable, kitchen, baths, water closets and drain tubes for the sum of $500 Mexican currency?

A. We did, and we put in the drain tubes from the water closets, and we drained all of the kitchen and the stable outside, entirely clear outside of the building.

Q. Where did you drain it to?

A. We drained it in the customary way that is done here in

Manila, through the building so that the water was entirely clear of the building.

Q. Where would the water drain, Mr. Campbell?

A. Out on to the surface, just as the local custom.

33 Q. Is it a custom here just to drain the water out and let it settle?

A. Yes, sir.

Q. (Reading.) "One bridge, $50." Did you have a contract for that?

A. No, that was ordered by Mr. Cook at the request of Mr. Ditmar from Mr. Go Toaco.

Q. (Reading.) "Extra depth of the post foundations, $180.00."

A. As there is an extra depth there we collected for it. That was put in under the order of Mr. Duff when he spliced the posts. That extra depth was put down according to his instructions.

Q. What does the specification say here as to the depth of the post foundations.

A. It says——

Mr. CHICOTE: The specifications speak for themselves.

The COURT: Why do you want him to tell?

Mr. KINNEY: I want him to read from the specifications.

Mr. CHICOTE: They appear on the paper. It does not require anyone to read it.

Mr. KINNEY: I cannot read it myself. I will have the translator read it and then ask if the foundations were made deeper than the specifications called for?

The COURT: As I understand it, he is not asking about the contents, but merely wants to read it to get at the language of the specifications.

The WITNESS: I will ask that the interpreter read it as it is in Spanish.

The TRANSLATOR: "The foundations to have ordinary Guadaloupe stone, one meter by one meter by one meter."

Q. (Reading.) "Extra depth of post foundations, 18 meters at $10 a meter, $180." Did you make the foundations more than a cubic meter, as required under the specifications?

A. Yes, sir.

34 Q. (Reading.) "Pillar under sale, $60." Who ordered that, and why was that put under that?

A. That was in the original contract to have those posts under there, and Mr. Cottencamp wished to make a fine dining room and billiard hall underneath the house where previously we had intended to use it for carriages and horses, and he ordered us to take out the posts—I don't remember whether two or three. We took them entirely out and put in large joists to support the floor, and after the arrival of Mr. Cook, he thought, as they had decided not to have the large dining room, and billiard hall below, that they would support the floor and give it more strength by returning that post to its place. The charge is for that change.

Q. Then you charged $60 for putting it up and taking it down again?

A. We charged $60 for taking down the posts that were in the contract and strengthening it with large beams and afterwards putting in another new post.

Q. None of that is on this bill, "pillar under sala, $60." You threw in all the work?

A. Those are all very short. There is not very much explanation with any of them.

Q. I agree with you there. Now, Mr. Campbell, you stated that the sand that you put on the Behn, Meyer & Co. property was measured by the representative of Behn, Meyer & Co. Did anybody representing you measure it?

A. My man merely was there to see that the filling went on and to receive the receipts from Behn, Meyer's representative.

Q. You had a man there as well as Behn, Meyer & Co.?

A. Yes, sir.

Q. Do you remember whether the wall around the whole property there now was around when the dirt was put on or was
35 it put around subsequently?

A. It was put around very nearly towards the end.

Q. And the dirt was filled in then to the wall after the wall was built?

A. Yes, sir.

Redirect examination by COUNSEL FOR PLAINTIFFS.

By Mr. CHICOTE:

Q. Are you acquainted with the handwriting of Cottencamp and Mr. Duff?

A. Yes, sir.

Q. I will now hand you a bunch of letters and ask you to identify them and state whether or not you received them at any time?

A. I do recognize these.

Q. And did you receive them?

A. Yes, sir.

Mr. CHICOTE: I will now introduce in evidence these letters identified by the witness.

Mr. KINNEY: No objection.

(Received in evidence and all are marked together as plaintiff's Exhibit G (7 letters).

Q. Are you acquainted with the handwriting of Mr. Cook?

A. Yes, sir.

Q. I will ask you whether or not these are the contracts entered into between you and Behn, Meyer & Co. for the sand furnished by you for the filling work up there?

A. Yes, sir, this is signed by Mr. Ditmar.

Q. Now, turn to the other letter and state whether or not you received that letter from Mr. Cook?

A. Yes, I received that letter from Mr. Cook.

Q. And now, look over the other letters and state whether or not you also received them?

A. I received this one from Mr. Ditmar. This last one is a letter that I wrote to Mr. Cook.

Mr. CHICOTE: I offer them in evidence.

36 Mr. KINNEY: I have no objection to their going in.

(Received in evidence and marked plaintiff's Exhibit H, consisting of four letters.)

Recross-examination by COUNSEL FOR DEFENDANTS.

By Mr. KINNEY:

Q. You stated a while ago, Mr. Campbell, I understood you, that your representatives didn't measure the sand delivered, is that correct?

A. It was not measured actually by my man, but the two men were there together. It was in charge of Behn, Meyer & Co.'s man.

Q. This letter of yours, which you say is a copy of a letter written to Mr. Cook, is dated April 30, 1892. That was about more than a year closer to the time than we are now. You say there the material was measured as taken from the banca, a representative of Behn, Meyer & Co. being present and checking it as delivered. Who did the measuring when Behn, Meyer & Co.'s representative was there?

A. The laborers really did the measuring, but Behn, Meyer & Co.'s man oversaw the work and received it or not as he wished.

Q. Wasn't your man there to represent you?

A. Yes, sir.

ARNOLD DITTMAR, a witness called on behalf of the plaintiffs, being first duly sworn, testified as follows:

By Mr. CHICOTE:

Q. Will you please state your name?

A. Arnold Dittmar.

Q. What is your occupation?

A. Manager of Behn, Meyer & Co.; merchant.

Q. Was a subpœna *duces tecum* served upon you on the 13th instant?

A. Yes.

37 Q. Are you prepared to comply with this order of the court?

A. Yes.

Q. Will you produce the books called for in this?

A. It is lying there: a big book.

Mr. KINNEY: If the court please, there is a little difference of not quite $200 pesos, but, to save time, we are willing to admit that there is a balance of $9250.62 due the plaintiff, and the only item in that that is questioned is the item "Miscellaneous additions and alteration, $2333.12." If the court finds that the item of $2333.12 is due, then there is a balance due him of $9250.62, as claimed in his

complaint, subject, of course, to our counter claim; that the arithmetic of it is $9250.62.

Plaintiff admits that he has collected $81,497.65 for the sand which was put upon defendant's property. The defendant admits that if plaintiff proves that he put 64,444 cubic meters of earth and sand upon defendant's property that there will then be due the plaintiff an additional sum of $2279.55.

Q. Did you also bring with you, Mr. Dittmar, the memorandum book kept by your representative on that work of the sand received by him on the ground?

A. I understand there were only loose receipts given, and they were entered afterwards in our office in the book here.

Q. Whenever you made a payment for this sand, would you make an entry in this book?

A. No; the entries into the big book are made either from the cash book or from the check book.

Q. Then, this is a ledger, is it not?

A. No, it is an account current.

38 Q. Did you bring with you the book that showed the different payments made by you on the sand?

A. Yes, sir, that big book contains everything.

Q. Now, will you turn over to your account under date of February 9th and state the amount paid by your firm for the sand?

A. February 8th, $3235.70.

Q. Did you make any payment for sand at all on the 9th of February?

A. No, not that I know of.

Q. Now, please state how much you paid on February 20th?

A. $4304.95.

Q. Now, please look over to the 27th of February and see how much you paid.

A. On the 1st of March it is dated here, $4633.85.

Q. How much did you pay March 7th?

A. March 8th, $4443.40.

Q. And how much did you pay March 14th?

A. On the 15th, $4341.68.

Q. How much did you pay on March 20th?

A. On the 22d, $3982.55.

Q. Have you got bills for all these payments made by you upon those dates you just now testified to?

Mr. CHICOTE: I am sorry to trouble the court and take up its valuable time, but I believe there is no other way to find out this account correctly unless I compare the receipts with this book here. Several of the bills have not been paid yet.

I now offer in evidence these two books to show the amount of sand actually delivered by plaintiff to defendant company. In offering this book in evidence, my purpose is only to show the different receipts and the amount of sand delivered, so that, in

39 making up my bill of exceptions, in case this case is appealed, it will not be necessary to copy the whole book, but would

simply refer to the number of the receipt, folio of the book, and the amount entered therein.

Mr. KINNEY: The introduction of the book as evidence is objected to on the ground that there is no proof whatever as to the correctness of the book, that a mere notation in that book by a clerk of seven figures is no evidence of the fact that Behn, Meyer & Co. received or did not receive anything. The authenticity of a book nor proof of its correctness has not yet been established.

The COURT: I sustain the objection to the introduction of the book, upon the objection of the defendant.

Mr. CHICOTE: To which ruling of the court I except, for the reason that this book is a book kept by Behn, Meyer & Co. who are the defendants in this case, and for the further reason that this book was brought to the court by the representative of Behn, Meyer & Co. in response to a subpœna served upon him; and that these books were brought by the representative of Behn, Meyer & Co. in response to a *subpœna duces tecum* served upon said representative, directing him to produce before the court the books kept by a man by the name of Apacible, and also by a man named Carcel, and for the further reason that Behn, Meyer & Co. did not pay for the sand furnished by the plaintiffs according to their bills, but according to the said book, as will be seen by several bills also exhibited by defendant-, that before any bill is paid they will refer to the book in question.

Q. As the manager of Behn, Meyer & Co., did you at any time personally pay, or direct your subordinates in the office to pay, any bills for sand?

A. Yes, sir, I did.

Q. Before paying any bill, what books would you refer to?

40 A. No books, only the receipts.

Q. What receipts?

A. Receipts signed by the man employed by me.

Q. Have you these receipts sent to you by your employee?

A. Yes, sir, he brought them over himself.

Q. Well, have you got some of them now?

A. Yes, they are lying there.

Q. Who gave this book to you?

A. I had it in the office, but I couldn't say who wrote it.

Q. Why did you have this book in your office?

A. Well, we put down according to the receipts that we had receited for, and afterwards brought the book to our office.

Q. When did you move into this house, Mr. Dittmar?

A. The beginning of May of last year.

Q. And you have continued to live in there since?

A. Yes.

Q. Did you make any repairs in the building since?

A. Yes.

Q. Many repairs?

A. About $2500 worth; alterations and repairs.

Q. At the time these alterations and repairs were carried on, were either Campbell or Go Toaco present?

A. No.

Q. Did you get their consent or either of them to making these repairs?

A. No.

Q. Were you acquainted with Mr. Duff?

A. I have seen him twice or three times.

Q. Do you know what connection he had with this building during the course of its construction?

A. He was called as a surveyor about the middle of October.

Q. As such surveyor, what were his duties, what power did you grant him?

A. To see that the building was properly carried out.

41 Q. And was Mr. Cook also employed as a surveyor?

A. Later on; after the death of Mr. Duff.

Q. (Referring to photographs D, E, and F). Are these correct pictures of the building?

A. Yes.

Q. Now, will you please examine this bunch of letters and look at the signature of Mr. Cottoncamp and state whether or not those letters were written by him as manager of the firm of Behn, Meyer & Co.?

A. There are three letters signed here by Mr. Cottoncamp, and I recognize the signature, and he certainly was authorized to sign such letters.

Q. And are you also familiar with the signature of Mr. Duff?

A. No, I am not.

Q. Now, will you please examine a letter attached to the bunch of letters marked Exhibit H, and state whether or not that letter was written by Behn, Meyer & Co.?

A. Yes, signed by myself.

Q. Did you receive a reply to that letter?

A. I don't remember whether we did or not; I think we did, but I am not certain.

Q. Do you know who are living in the house now, at the present time?

A*n*. An uncle of mine, Mr. Amzi.

Q. How many persons altogether?

A. Two, including myself.

Q. Did you know the original plan of this house?

A. Yes.

Q. And are you familiar with the plan presented?

A. To a certain extent, yes.

Q. Were there any changes or alterations made in the original plan?

A. Yes.

Q. Why were these alterations made?

A. On account of the bad quality of the timber supplied and to make the house look better.

42 Q. Who made these alterations?

A. Messrs. Campbell & Go Toaco.

Q. Why did they make this?

A. They were ordered to do so.

Q. Can you name all the changes that were ordered made one by one?

A. No.

Q. You stated that some alterations were ordered by you. Do you mean that these are the alterations that now appear in the second plan or alteration that affected the first or original plan?

A. No; I gave subsequently orders.

Q. What do you mean? after the first plan you gave subsequent orders?

A. On the second plan, there were certain alterations, and after they were made, I bought a staircase or so, and small alterations were made even after the second plan.

Q. Are you acquainted with the man appointed by you to count the sand?

A. With two of them; there were three of them.

Q. Is that one of them?

A. Yes.

Q. Do you know his name?

A. Cercal.

(No cross-examination.)

GEORGE IGNACIO CERCAL, a witness called on behalf of the plaintiffs, being first duly sworn, testified as follows:

By Mr. CHICOTE:

Q. What is your name?

A. George Ignacio Cercal.

Q. Where do you live?

A. In Santa Ana.

Q. Were you at any time employed by Behn, Meyer & Co.?

A. Yes, I was employed by them.

43 Q. What position did you hold in that firm?

A. To note down in the book the sand received.

Q. Where is that book in which you noted down the sand received on that ground?

A. I delivered the book in the office of Behn, Meyer & Co.

Q. I now hand you two books and please state if either one is the book which you referred to?

A. I commenced to make my entries on folio 145 of this book under the date of October 11, 1901, and the last entry made by me is at folio 121 of another book which is dated February 7th.

Q. Who relieved you of this job?

A. I don't know, because when I left there I became sick and went to the hospital.

Q. Were you also acquainted with the man who was employed there before you?

A. Yes, I knew him by sight only, but I don't know his name.

Q. By whose instruction did you make the entries in the book of the sand delivered?

A. By order of Mr. Cottoncamp and later by order of Mr. Dittmar.

Q. Do these books belong to you privately or were they books of Behen, Meyer & Co.?
A. They belong to Behn, Meyer & Co.

Mr. CHICOTE: I would insist, Your Honor, in offering these books in evidence. They have now been fully identified as the books belonging to Behn, Meyer & Co. and not books of any private person.

Mr. KINNEY: I have no objection in the world to the books going in. They are not admissible at all, but I have no objection to their going in, except as proof that that quantity of sand was de-
44 livered to us. If he can get them in on any other ground, I am satisfied. To repeat, I object to the introduction of the books as proof that the quantity of sand which is shown on those books to have been delivered to us was delivered.

The COURT: I think the objection is well taken.

Mr. CHICOTE: I take another exception to the ruling of the court. I make my offer in the following way: I offer these books in evidence as the books belonging to Behn, Meyer & Co. and kept by the witness on the stand and the other two men as successor and predecessor.

Mr. KINNEY: I have no objection.

(Received in evidence and marked plaintiff's Exhibits I and J, June 15, 1905, respectively.)

Q. During the time you were employed there, or, in other words, during the time you kept these books in question, did you enter every cubic foot of sand that you received on the ground?
A. Yes.

Cross-examination by COUNSEL FOR DEFENDANTS.

By Mr. KINNEY:

Q. How old are you, John?
A. Twenty-six.
Q. How long have you lived in Manila?
A. You can find that out from the books of Cottoncamp.
Q. Why don't you talk English?
(No answer.)
Q. You understand English?
A. Yes, a little bit.
Q. Where were you educated?
A. In a German school.
Q. How long did you go to school?
A. Six years.
Q. Did you study mathematics?
A. I have studied how to read, write, and make accounts.
Q. How do you measure a cubic foot?
A. I measure the height, the thickness, and the length.
Q. How do you measure a cubic meter?
45 A. In the same way as I explained.
Q. Well, how did you measure the cubic contents of the banca?

A. I only measured the water-line of the banca.

Q. How could you tell the number of cubic meters of sand there were in the banca?

A. There are certain marks on both sides of the bancas, and I measured the contents by those marks, which they use on the water-line; and it was the instruction of Mr. Cottoncamp that it was not necessary to measure the bancas.

Q. Do you remember Banca No. 652?

A. No, I do not remember.

Q. (Showing witness one of the two books)

A. No, I don't remember.

Q. Is that your writing?

A. Yes.

Q. On page 43 of plaintiff's Exhibit J?

A. Yes.

Q. The first entry there by you is Banca No. 652, seven meters and a half.

A. 7.50 meters.

Q. How do you know that banca held seven meters and a half?

A. Because it was measured in my presence.

Q. How much would a banca contain that was three meters long, two meters wide, and one meter deep, how much does that contain?

Mr. CHICOTE: I will object to the question, because I did not offer this witness as an expert to testify about mathematics, and for the further reason that this question is so unintelligible. The question was for three meters in length and two in breadth and one in depth. It is not possible to measure length by cubic measure.

The COURT: I understand this is plaintiff's witness and that he is introduced to show that he measured that sand and the
46 counsel on the other side would have a right to test his capacity to do that, so I overrule the objection.

Mr. CHICOTE: I except to the ruling of the court.

A. Four cubic meters.

Q. How many meters would a banca hold that was three meters fifty long, one meter fifty broad, and fifty centimeters deep?

A. Five and a half.

Q. Do you drink intoxicating liquors?

A. Yes, I have drunk with my friends on several occasions.

Q. Do you ever get drunk?

A. Yes, one night I was drunk and remained in the office of Behn, Meyer & Company during the night.

Q. Never been drunk but once?

A. No.

Adjourned to 3:00 P. M.

D. W. SMITH, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

By Mr. CHICOTE:

Q. What is your name?
A. D. W. Smith.
Q. What is your occupation?
A. Builder.
Q. How long have you been engaged in the Philippines in building?
A. Over three and a half years.
Q. Do you know the house that Messrs. Behn, Meyer & Co. have at Uli-Uli?
A. I do.
Q. During the time that you were here in the Philippines, where have you spent your time in building?
A. In Manila and outside in the provinces a little.
Q. Did you see the original plans that were made for the house of Behn, Meyer & Company?
A. Yes.
47 Q. When did you see this house?
A. Yesterday afternoon I made an examination of it.
Q. In your opinion as an expert builder, what is the condition of that house with reference to the original plan?
A. It is somewhat changed, considerably changed.
Q. And these changes that you have noticed, are they improvements made from the original plan or were they omissions?
A. They were improvements, I think.
Q. Do you think that the work done on that building complied with the original plan and the contract?
A. I should say so from my examination.
Q. In your opinion as an expert builder, do you think that the work on that house is completed so that it makes the house habitable?
A. Yes, sir.

(No cross-examination.)

VICENTE W. PASTOR, a witness called on behalf of the plaintiffs, being first duly sworn, testified as follows:

By Mr. CHICOTE:

Q. What is your name?
A. Vicente W. Pastor.
Q. What is your occupation and residence?
A. Spanish Civil Engineer; residence in Manila.
Q. How long have you been practicing as a civil engineer?
A. About twenty years.
Q. How long were you practicing as such civil engineer in the Philippines?
A. In the Philippines, fifteen years.
Q. Were you ever employed by the government as such civil engineer?

A. I was employed by the Spanish government as Chief Engineer for the Province of Bohol, Cebu, and Samar.

48 Q. And in Manila, how long were you a civil engineer?

A. About three years.

Q. Do you know the house of Behn, Meyer & Company at Uli-Uli?

A. Yes, sir.

Q. Have you seen the original plans, specifications, and the contracts of that building?

A. Yes, sir.

Q. Did you examine the building?

A. Yes, sir.

Q. Can you give your opinion as to whether the contract, the plans and the specifications of that building have been complied with by the man in charge of making the building?

A. As the works on this building had suffered various modifications, in substance the work has been entirely different from that of the specifications or the contract. I mean to say that the original plan was modified, as the work done on this building has suffered modifications. There were modifications made on this building, so that the original plan has not been strictly carried out. The construction of this building has been complied with as to the original plan, but in this plan there has been several modifications.

Q. The specifications for that plan were complied with?

A. The dimensions in the original plan were complied with.

Q. Can you tell us what modifications you observed in this building?

A. There were several modifications made from the original plan, and, if Your Honor will allow us a sufficient time to finish the plan which I and Mr. Arquilles are both preparing at this time, we think we will have them done in a few days, in which we will show to Your Honor by means of a plan the various modifications made from the original plan of the house.

Q. Can you tell me if in the old plan, did you see there

49 any plan of the ceiling in the building?

A. In this specification there is nothing mentioned as to the ceiling for the ground floor. In this contract there is nothing of the ceiling mentioned.

Q. Did you see if the present building has a plain ceiling?

A. Yes, sir.

Q. In your judgment, what does that work amount to?

A. That goes within the request I have just made to the judge. In that plan we can give the modifications that the present building had suffered, and also the amount of materials at that time.

Q. The changes that you have noticed in the present building, do you think that they are improvements made on this building or are they omissions?

A. They are improvements.

Q. Did you see during the inspection of this building if there was a stone fence around the house?

A. Yes, sir.

Q. Did you examine the doors of that house?

A. Yes, sir.

Q. Did you examine the difference of those doors from the original plan and specifications?

A. I want that question explained to me before I answer.

Q. State if from the materials and the number of doors you found in this house there is any difference from the original specifications and plan in this building?

A. We have found a difference in the quality of the timber used for these doors; the specification states the kinds of timbers of the third group, and the timbers used in the doors of the present building are made of the first group, or superior kind of timber.

Q. Will you please state if you found in this building the items specified on page 3 of the record?

50 A. Generally speaking, yes, sir.

Q. What do you mean by "generally speaking"?

A. I mean to say that with relation to the amount of these items, we will present to the judge later on the plan and the amount of the improvements done on this house.

Q. But those items as mentioned there, without taking into account the amount of each item, did you find them in the present building?

A. Yes, sir.

Q. Were they improvements made outside of the original contract?

A. Yes, sir.

Q. Did you examine the posts of this house?

A. Yes, sir.

Q. Did you examine the foundations upon which the posts of this house are erected?

A. Yes, sir.

Q. Was the original contract complied with with reference to the foundations upon which these posts are erected?

A. Yes, sir, with excess; more than what is required.

Q. Why do you say that is complied with in excess of what is required in the contract?

A. If you will show me the plan, I will answer that question by looking at it. (Looking at plan.) The plan shows a depth of one yard and one square yard in width. We have found under those posts an average depth of 1.20 meters when the plan does not require more than 1 meter of depth.

Q. Did you examine the blocks or rockers upon which the pillars are made?

A. Yes, sir.

Q. Did you find them defective or good?

A. Good.

Q. Did you examine the joint of the pillars?

A. Yes.

Q. Can you give us your opinion as to the way the joints were made?

A. The joints were made as generally made here in the city.

Q. Did you examine the floor of this house?
A. Yes, sir.
51 Q. The upper floor?
A. Yes, sir.
Q. Can you give us your opinion as to this floor? Can you state in your opinion if the floor is all right or not?
A. It is all right.
Q. Did you find in the floor of this house any warped timbers?
A. No.
Q. Was the floor smooth or rough?
A. Smooth.
Q. With reference to the roof of this house, how did you find it, did you find it defective or otherwise?
A. I didn't find any defect in it.
Q. Is it true that the frame of this roof and the king-posts are drawn apart from ½ to 2½ centimeters?
A. With reference to that, I should like to ask an explanation of the defendant, as neither myself nor my companion have reached a conclusion on this point. I did not find any defects.
Q. Did you examine the bath rooms of this house?
A. Yes, sir.
Q. Do you think they can be used as bath rooms?
A. Yes, sir.
Q. Generally speaking, what is your opinion with reference to the construction of this building?
A. Good.
Q. Did you see the land upon which this building is erected and all the surroundings?
A. Yes, sir.
Q. Did you examine the land now covered with sand?
A. Yes, sir.
Q. Do you know the area of this land approximately?
A. I didn't measure it. I confined myself to the measures as mentioned in the record.
Q. Do you think that a piece of land of about 20,000 square meters, the work being done in this land at a depth of 1.60
52 meters, do you think there was as much as 62,000 to 64,000 cubic meters of sand used in that?
A. I desire to make a statement as to the examination I have made of this land. In order to do this, I will have to make an explanation as to the land itself and also the neighboring land in order to come to the condition of the land in question. The original land was sticky (arcilloso), and this land, according to information, it was used for zacati or grass land, and on account of this land being near to the river it had been some time covered with water. That makes this land swampy or damp. I am giving these notes so as to lay the foundation of my opinion. The work in leveling this land was done with sand taken from the river and laid on the land wet; that this sand on account of being wet makes it more heavy and it mounts to about 30% of the whole

volume, and the land being sticky, as I have already stated before, and being wet, it amounts to 50% in volume. On account of being wet, this land becomes more sticky and consequently becomes more than the earth represents.

The COURT: What has that got to do with the answer to his question as to the number of cubic meters of sand or dirt that was thrown in there, and why is it necessary to consume half a day with all that sort of stuff?

Mr. CHICOTE: I am asking the witness his opinion, if he thinks there was as much as 62,000 cubic meters of sand used in this land, and he is giving here his explanation.

The COURT: Ask him if his explanation explains anything. I want to get into the sense of it.

Mr. CHICOTE: He is explaining all of that 62,000 meters being used on account of that sand being wet.

The WITNESS: In my opinion, taking into consideration
53 the condition of the sand as it was used in this land and also the condition of the land, 62,000 cubic meters of sand might have been used in this land.

Q. What do you mean to say when you stated "In view of the condition of the sand"?

A. That the sand which was used to level this land was wet.

Q. What is the difference in the volume of sand when the sand is wet and when it is dry?

A. It has a difference from 10% to 20% from sand taken from land; and the sand when it is damp goes up to 38%.

Q. What do you mean to say when you stated, "the condition of the land"?

A. I meant to say that the land in question when the work was done was full of water.

Mr. CHICOTE: I now ask Your Honor that this witness be allowed a sufficient time in order to complete a plan which he is now preparing upon which Your Honor will see the difference from this plan to the original plan and the actual condition of this house and the original plan and the specifications, and also to let the witness give a complete report as to how he found this question of sand and land and all these questions mentioned in the complaint, and that this report in writing which he is going to make be sworn to before the clerk; and in the same way that this other gentleman here, as engineers, be also allowed time to make their reports the same as this man.

The COURT: Well, I cannot do that. I cannot suspend this case and wait for witnesses to be prepared. The case was announced ready for trial and we have commenced the trial. This witness might have been at work on this a month ago.

Mr. CHICOTE: I don't ask for a suspension of the trial, and also desire that this witness be allowed to make a report for your
54 information.

The COURT: Do you suppose after he had made the report that I am going to permit him to go on the stand again?

Mr. CHICOTE: After the witness has prepared his report he won't have to testify any more; it is only for the benefit of the court in order that you see the difference.

The COURT: I don't think that is the way to examine a witness. I overrule the application.

Mr. CHICOTE: I take an exception, on the ground that the report which I propose to present is a technical opinion of the witness that cannot be introduced in evidence by a system of questions and answers on account of the man who has to direct these questions to the witness not having the character of a civil engineer and therefore he is not qualified to ask such technical questions as ought to be propounded to this witness. On the second ground, that this report or infoemation and the plan of the actual condition of this house, and especially the plan which this witness is preparing, would be the most proper way for the court to estimate the difference between the original plans for construction and the actual construction done on this house. Therefore I ask your Honor that this plan and report for your information be admitted in order to give more information to this court about the condition of this house. I have not presented that before, because I was not the attorney of record in this case and had not taken charge of this case until a couple of days ago; and, on the other hand, this witness has informed the plaintiffs that he has not had sufficient time to make the examination.

The COURT: I overrule the objection.

Plaintiffs' counsel says in reply to defendants' counsel
55 that he has been employed about two weeks, but the court is of the opinion that it is immaterial what length of time he has been employed; that counsel for plaintiff, when the case was called this morning, announced that he was ready for trial, and so did defendants' counsel, and the court cannot now suspend the trial of this case in order that the witnesses be prepared to testify. This is a matter that should have been looked into by counsel before announcing that they were ready to go into trial.

Cross-examination by COUNSEL FOR DEFENDANTS.

By Mr. KINNEY:

Q. Your information as to the condition of this property before the sand was put on is not from personal knowledge but from what you have been told?

A. I have examined the neighboring lands and also the condition of the land before this sand was put on, and also by information.

Q. When did you examine the land on which the sand was delivered?

A. About two or three days ago.

Q. Did you ever examine it before the sand was put on?

A. No.

CAYETANO ARGUELLES, a witness called on behalf of the plaintiffs, being first duly sworn, testified as follows:

By Mr. CHICOTE:

Q. What is your name?
A. Cayetano Arguelles.
Q. And your occupation?
A. Architect.
Q. How long have you been engaged as an architect?
A. I have been engaged in this business for a long time.
Q. How many years, more or less?
A. Since 1884.
56 Q. Where did you work as an architect?
A. In the province of Laguna, Bataan, and Manila.
Q. Do you know the house of Behn, Meyer & Co. at Uli-Uli?
A. I do.
Q. Do you know the original plan for the construction of this house and the specification of it?
A. I do.
Q. Did you examine the house within the last few days?
A. Yes, sir.
Q. What opinion have you as to the difference of the present building from that of the original plan?
A. In my opinion, there were several modifications.
Q. Those differences that you say, are those improvements on the original plans or are they omissions?
A. They are improvements.
Q. Do you know if all the improvements mentioned in the various items at page 3 of this record are found in this building?
A. Yes, sir.
Q. Did you examine every one of those items and ascertain whether or not they were made?
A. Yes, sir; these improvements were made in this house.
Q. Can you give us an opinion as to the value of these improvements and whether the amount stated on page 3 is correct?
A. I cannot give an opinion as to the amount of the improvements without making a careful examination of the house and the dimensions of these improvements. Here the items give the size of the door. How can I give my opinion as to its dimensions without making a careful examination?
Q. The specifications made in the original plan, do you think, in your opinion, they were carried out?
57 A. In the first place, I noticed modifications. With reference to these specifications, I notice first that the excavations and the foundations here have excavations for 49 pillars. In the new plan drawn by me appears 54 foundations for pillars. In the specification it appears 43 pillars, and in the plan made by me are 55 pillars. As we haven't had sufficient time to carefully examine them, these are all the data that we have taken from this building.
Q. Did you examine the house?
A. Yes, sir.

Q. Generally speaking, what in your opinion, is the condition of this house now?

A. The house is built up according to the kind of materials.

Q. What do you mean by saying, "according to the kind of materials"?

A. I mean to say that the timber of the third group, in joining them, after a length of time, on account of the heat, they came apart, that is, they would shrink and draw apart.

Q. Did you examine the foundation upon which the pillars of this house are?

A. Yes.

Q. Did you find the foundations made according to the specifications?

A. Those that are actually made there with the openings, yes, sir.

Q. Did you examine the foundations upon which the pillars are?

A. Yes, sir.

Q. In your opinion, do you think that the foundation upon which the pillars are are weak or are sufficient strong to support them?

A. The pillars are upon the foundation and they are strong enough and according to the requisites of the city ordinance.

Q. What is your opinion as to the floor of the house and
58 also the frame of the roof?

A. They are as ordinarily constructed here.

Q. Are they well constructed or bad?

A. They are well constructed.

No cross-examination.

Plaintiffs rest."

59 JAMES F. CASE, a witness called on behalf of the defendants, being first duly sworn, testified as follows:

By Mr. KINNEY:

Q. What is your profession, Major Case, and what official position do you hold, if any?

A. Civil Engineer, Chief Engineer, new water system, City of Manila.

Q. What experience have you had as a civil engineer?

A. A university course and fourteen years of practice.

Q. Does your education and experience as a civil engineer embrace an education in architecture as well?

A. What might be termed a short course in architecture, yes, sir, that which generally pertains to a civil engineer and not an architect straight.

Q. Did you make an examination of the property of Behn, Meyer & Co. on Calle Uli-Uli?

A. I did.

Q. State to the court what observations you made with reference to the construction of that house in the matter of its being constructed, first, as to complying with the plans and specifications. I will hand you for your convenience one of the Exhibits, a picture of the house.

A. I should preface my remarks by saying that the plans and specifications were not entirely definite. May I use the field notes taken at that time?

The COURT: You may refresh your memory with any paper you have got.

The WITNESS: I made my first examination on January 11, and have my field notes here. In the first place, the specifications for the foundations provided that the posts should be set on a stone foundation of 1 cubic meter—1 meter x 1 meter x 1 meter; several of these foundations had been dug out, exposed, and I examined
60 them; two of those footings I found with the foot of the post set in the middle running down half way through this stone foundation, giving *on* only half of a cubic meter of foundation under the post; the balance of the stone work above the foot of the post gave no advantage whatsoever to the foundation. I examined five of those posts altogether.

By the COURT:

Q. And did you find all of them in that condition?

A. No, sir. On one other post, which was composed of six layers of Guadaloupe stone, one above the other, making up the cubic meter, the post had been set down through two layers, having two-thirds of the footing affected; the balance above that was not affected as a foundation. On the post under the stairs within the house, there were three layers or fifty centimeters under the end of the post, and these three layers had evidently been set on a plank, because the foundation was so poor at that point,—the plank underlying the stone. The house itself is supported by posts and a wall running all around under the main house, and a porch projecting from the house is supported by a single post at the outside edge of the porch. This porch, in place of sloping towards the outside so as to drain away from the house, actually slopes into the house, so that any rain going on to the porch will run into the house. I proved this myself by pouring water on the boards and seeing it run into the house.

The hanging of the doors on the ground floor is, in my opinion, imperfectly done. There are no sills to the doors. These, while probably not called for in the contract, yet by their not being there, they leave a space so large that anybody can put his fingers
61 under the door, and, catching the lock at the bottom, raise it and open the door from the outside. The locks, of course, hold the doors, but there are so many panels to the doors that if the bottom were opened I think the door could be pushed open in spite of the locks. There are little bolts that drop down into the tiling, and they can all be raised by putting the hands underneath. That is so both in the front door and back door downstairs. The posts are all jointed,— that is, by a change in the original contract; a supplementary agreement was made that the lower part of the post should be of superior quality of wood to the upper part. These joints are held together by two ⅝ bolts,— 2 bolts ⅝ in. in diameter. No straps are used, and I consider the joint weak. Any strain on

these posts due to an earthquake or anything else which would strain the posts other than in a vertical direction would tend to strip these bolts through the wood and break the joint apart. Is that clear to the judge?

Q. State how it is usual, in joining posts together, how it is usual to splice or fasten them.

A. This splice or joint, of course, would be directly benefited by the introduction of a strap through which the bolts would run, and to make a first-class job there would be four bolts instead of two.

Q. Now, Major, as to the posts that you examined, you state that you examined five of the posts. Were they the main posts of the house or the posts of the porch?

A. They were all of the main posts of the house.

Q. Were the posts that you examined the important posts for maintaining the structure of the house?

A. Some of them, yes, sir.

Q. Go ahead.

62 A. The second floor is quite noticeably uneven. In my opinion, this is due to settlement of the house. The floor boards have evidently shrunk a great deal since they were put in, and at present the floor has many wide cracks. Between every board there is quite a wide crack.

By the COURT:

Q. What boards are they?

A. The floor boards themselves. These cracks have been partially stopped by dropping in strips from one-quarter of an inch to three-eight- or nearly half an inch in width in places; but they were not all filled in that way, by any means.

Q. As to the floor, Major, are there any indications of any work having been done to the floor subsequent to its being originally laid?

A. The introduction of the strips that I spoke of has certainly been done since the floor was originally laid, and there are some indications that portions of the floor had been taken up and re-laid.

Q. What were those indications?

A. Extra nail holes. The roof trusses at the hips have pulled apart. In my opinion, this was due to the settlement of the house toward the edges, where it carried the heaviest load, towards the walls, while in the center of the house, supporting the king post that runs to the peak of the roof, that did not settle so much, and the settling of the outside, in my opinion, is the cause of pulling the main rafters apart from the king post. One post still had a bearing of about three-eighths of an inch and had pulled out about a half inch.

By the COURT:

Q. That means the floor is higher in the center than around the edges?

A. Yes, sir.

Q. How many of those rafters were pulled apart?

A. I didn't know the exact number, but all that ran to the
63 peak, right down. All that ran to the highest point of the house are pulled in that way, in the center of the main building. The galvanized iron roof itself seems to have been fairly well laid, although I noticed one leak and that was very plain. I mean by that, that you could see through the hole in the roof, see the light outside. On the under side of the rafters, rubberoid roofing, a sort of a roofing material, has been tacked with nails, with tacks, and a great many of these nails have been pulled out, and the rubberoid hangs in festoons from the rafters. The tacks have just pulled out and drop it in places, and here it will sag down and here it will be up again in place.

By Mr. KINNEY:

Q. As to that rubberoid, Major, is that put on in the usual method, or in the way that rubberoid should have been put on?

A. Mr. Kinney, that is a hard question to answer, for rubberoid is supposed to be roofing material itself. I have not seen anything in the specifications as to how this rubberoid was supposed to have been put on. It certainly offers no protection, as it is now, as a roof.

Q. Well, to do a workmanlike job, how would rubberoid be put on?

A. Either used alone as a roofing material or laid directly under some other roofing material, on top of the rafters.

Q. And this was tacked beneath the rafters?

A. Beneath the rafters, with a narroe space between the rubberoid and the galvanized iron.

Q. What effect would tacking it beneath the rafters have upon it so far as making it secure is concerned, as compared with putting it above the rafters, as you describe, or on top of the rafters?

64 A. Why, tacking it below on the rafters leaves all the weight of the rubberoid simply on the heads of the tacks which hold it there, and of course they pulled loose; it is very insecure.

Q. As to its being a protection in the way of roofing, would it be as efficacious tacked below the rafters as on top?

A. No, sir.

Q. Well, sir, what else did you observe?

A. That covers about all the points in regard to the house, I believe.

Q. Now, Major Case, the house as it stood, what is your opinion about it as to its being a workmanlike job?

A. I do not consider it a good, workmanlike job.

Q. In your opinion, Major Case, how much would it cost to put this house in the condition in which it would have been in, under the contract, if the work had been done in a workmanlike manner, I say, under the plans and specifications?

A. I want to preface my explanation to that question by saying that it is very difficult to arrive at anything more than an approximation of the value of the cost of making the changes spoken of. In the first place, so far as I can see, the materials used in the

house were of a satisfactory quality throughout, the material was. I believe that no repairs can be made to the house until the foundations are repaired, and to repair the foundations will require a great deal of labor and some small materials. The condition of the floors is such that they would necessarily have to be taken up and relaid; the doors would have to be re-hung, the windows replaced, the rafters—in fact, the roof—would have to come off almost entirely to repair these rafters and put them in shape
65 to place the rubberoid roofing where it should be; and for that reason I have estimated on the basis that the cost of this house is divided approximately between 65% of the total cost of materials and 35% for labor. Of the materials, I think that 15% would be all the loss that would be entailed through taking up the materials. They are good materials, and such damage as actually would be done in taking the materials up could be replaced within the limits of 15% of the materials. Now, assuming that this house costs approximately $20,000, 65%, or the value of the materials, would be $13,000, and 15% of this $13,000 would be $1950, which, in my opinion, would cover all new materials needed to put the house back into good condition. The labor necessary in taking out the defective work and replacing it with good work, I believe, will cost one and one-half times what the original labor cost to repair the foundations and put the work back. That amounts to $10,500. On this basis, I have estimated the cost of putting the building in first-class condition to be $12,450.

Q. That is based, Major Case, on taking the materials that are in the house at the present time, making such repairs and such alterations as are necessary to put it in a good first-class condition with these materials that are already there, adding to them the materials that would be necessary to add by reason of loss in tearing down and putting back again, you make the total $12,450?

A. Yes, sir.

Q. In your opinion, Major Case, is there any more economical way of putting that house in the condition in which it would have been if the contract had been complied with by performing the work in a workmanlike manner?

A. I know of no other way.

66 Q. Did you make a survey of the property of Behn, Meyer & Co.?

A. I did.

Q. Did you make a sufficient examination to satisfy yourself that you were able to compute the quantity of sand which had been put upon that property?

A. Approximately, yes, sir.

Q. State to the court what examination was made by you and what method of computation was employed.

A. Six test pits were dug in different portions of the filled area from the top of the sand, the general level of the filled area, down to the distinct mark between the sand filling and the black muck or earth that was formerly a paddy field. The distance was care-

fully measured. The thickness of the filling in this first hole was 1 meter and 15 centimeters; in the second hole was 1 meter; in the third hole was 1 meter and 15 centimeters; in the fourth hole was 1 meter; in the fifth hole was 1 meter and 20 centimeters; and in the sixth hole, which was on the bank of the river, near the bank of the river, the depth was only 85 centimeters. As the ground shows, however, that there formerly existed a higher ridge along the river, I ignored this sixth measurement and didn't use it at all, because it was less than the general average and plainly showed that it was less than the other holes, due to a higher original ground next to the river. The average of the first five holes gives I meter and 10 centimeters for the average depth over the whole area. In making any fill of any materials, a certain settlement always takes place in the fill. Sand is one of the most compact of the materials that we work with, but under the conditions of a rather soft bottom and wet sand, I estimated a settlement of 15%, which I think, in my own judgment, is more than ample.

67 In this way, I determined the approximate depth of the filled area. I then made a survey with instruments, steel tapes, measuring the angles carefully and all distances of the filled area inside of a stone wall which surrounds the whole property, that is, taking the edge of the wall as the limits of the filled area. This gave me a superficial area of the filled areas there of 16,573¼ square meters. Having determined the area and the average approximate thickness of the filled area, the resultant cubic contents is obtained by multoplying one by the other, which gives the result of 20,965 cubic meters of filling in the property. These figures can be taken as approximately correct.

Q. 20,965 cubic meters is allowing, as I understand your calculation, 15% for shrinkage?

A. Yes.

Q. In other words, the measurement as shown to-day would be 15% less than the 20,965?

A. Yes, sir. Without the 15% the quantities would be 18,230 cubic meters; but it is usual—it is more than usual—it is obligatory on engineers to allow a shrinkage in a case of that kind.

Q. Did you encounter any trouble in discovering the line which marked the ending of the old dirt and the beginning of the sand?

A. No, sir, it was very plainly marked.

Q. Were the holes which had been dug in which these measurements had been made distributed at intervals over the property so as to enable you to get at a fair average guess?

A. Yes, sir, they were distributed over the whole area. That is, they were scattered around so as to give an approximation.

Q. Are you sufficiently familiar with zacate fields to know whether or not they are uniformly approximately level?

68 A. They are approximately level, except that they are divided into small tracts by what we call paddies, little embankments of earth, and are often cut up by canals. I must say that I didn't see this zacate field before it was filled up, and

I don't know how many of these little ridges there were, or how many canals may have existed on the property.

Q. Taking that, Major Case, as an ordinary zacate field, is there any doubt in your mind that the quantity of sand which you have testified was put upon there is as much as was put upon that property?

A. In my opinion, there is a very small error between my estimate and what was actually put on; that is, I think, there is very small room for error or difference.

Q. Do you think that, assuming that that was an ordinary rice paddy field, that it is possible that more than the quantity you have testified to could have been put on that land?

A. Possibly a small amount more, but certainly a very small percentage.

Q. Within what limits?

A. Within a maximum limit of 5% either way. It may be 5% more or less; certainly not more.

Q. You do not think, then, that by any possibility there could have been more than 5% more earth put in there than you have testified to?

A. No, sir.

Q. What is the ordinary allowance for shrinkage in filling for sand?

A. Ten per cent.; that is the ordinary allowance for what is known as earth excavation, whether it is sand or clay. That is the ordinary allowance by use among engineers for making fills. I think it is universal among all railroads.

Q. And in your computation, you have allowed 15% or
69 5% more than is ordinarily allowed?

A. Yes.

Q. Approximately, Major, what would have been the depth of that sand over that area if 62,000 cubic meters had been placed upon it?

A. About three meters deep, about three times as much as it is now.

Q. A meter is about a yard, is it not?

A. It is 3 feet 3 2/5 inches.

Q. Do you remember noticing, Major, whether the surface of that property is above or below the surface of Uli-Uli road?

A. I didn't examine it, but my recollection is that it is above Uli-Uli.

Q. So, Major, if 62,000 cubic meters had been put upon that land, the sand would have extended a depth of about 2 meters more than you found it to extend?

A. Yes, sir.

Q. Over the whole property?

A. Yes, sir.

Cross-examination by COUNSEL FOR PLAINTIFFS.

By Mr. CHICOTE:

Q. Do you know the original contract and specifications for the contract between Behn, Meyer & Co. and plaintiffs?

A. I have seen what I supposed was the original plans and aspecifications.

Q. Do you know the price for the original contract?

A. No, sir, I do not.

Q. What, in your opinion, would be the kind of a house for $13,000 Mex., this being the size of the house?

Mr. KINNEY: I object to that question, because the house as it was was to be built for something more than $22,000 Mex.; and further, Your Honor, I can cite authorities on the subject that, if he contracted to put it up for five cents with those materials, that he was obliged to put it up in a workmanlike way even if he
70 lost $20,000 on it. I object to it as being immaterial entirely to the issues.

The COURT: Ask Mr. Chicote if he understands the contract price.

Mr. CHICOTE: Yes, that is what the contract says, $13,000.

The COURT: I think the objection is well taken. If they contracted to build a house for $13,000, or any other sum, that, as mechanics, they would be presumed to do it in a workmanlike manner, and I think the objection is well taken.

Mr. CHICOTE: I except to the ruling of the court, on the ground that an engineer can technically tell the kind of a house that could be built for a certain amount of money, giving him the kind of materials and the area and the measurement of the house which is desired, and all of these facts are stated in this contract.

Q. Do you know what kind of materials were originally agreed upon between these parties, the materials that ought to be used in this house?

A. In general terms, yes.

Q. What materials were contracted for by these parties?

A. The contract names various timbers by names.

My recollection is that those names are included in the third group of timber, but I would have to look up the government list and compare the names at the present time to tell.

Q. And the timbers of the third group, what, in your opinion, do you think, are they of a superior kind?

A. The government has decided that question by dividing superior into first, second, and third groups.

Q. Well, but what is your opinion as to the third group, are they a superior kind of timber?

A. Certainly not.

Mr. KINNEY: We are not raising any question about the kind of material; it's about the way they are put together.

71 Q. What depth did you find in the holes dug to measure the foundations?

A. All of those piers are composed approximately of six rows of Guadaloupe stone and including the mortar they are slightly more than 1 meter.

Q. Do you know what is the depth specified in that contract?

A. Yes, sir.

Q. What is it?

A. 1 meter.

Q. What is this specification according to the original plan?

A. With regard to the depth?

Q. Yes.

A. They agreed, I believe, 1 meter.

Q. Don't you remember if it was 1 yard only according to the plan?

A. I don't know; I didn't notice that; I supposed that they agreed. I read it in the specifications there as 1 meter, 1 meter, 1 meter, and I didn't notice if there was any change in the plan.

Q. If you found a depth of more than 1 meter, what defect is that that you have noticed?

A. The defect is that not all of the pier, the footing, is under the post; the post carries the weight and transmits it to the pier, to the stone work. The post carries the weight down to the centre of the pier, so that only half of the pier does any work in carrying the load of the house.

Q. Then, in your opinion, the pillar ought to be above the foundation, then the pillar ought to rest upon the foundation? Then you mean to say that from the top of this foundation to the bottom ought to be 1 meter, and that the pillar ought to rest upon the top of this meter?

A. Exactly, that is what I read in the specifications, calling for a foundation of 1 meter x 1 meter x 1 meter.

Q. Will you please look at this plan and see if this plan is approved by the Municipal Board?

A. It appears so, yes, sir.

72 Q. Will you look at the foundation of the pillars. Are they just as you think they ought to be?

A. No, I don't.

Q. Is it true that just as it is here the pillar does not rest upon the foundation or the stone, but upon the earth, according to this plan?

A. There seems to be a very large difference between the specifications and the plan there.

Q. Can you tell by looking at this plan that the pillars as they are here rest upon the stone or upon the ground?

A. I should read that plan to mean that the bottom of the post went clear through the foundation and rested upon the ground.

Q. In your opinion, when Mr. Machuca, Mr. Go Toaco, made these pillars go through the foundation and rest on the stone, don't you think they made it more strong?

A. That question is not intelligible.

Q. My question is this: That when Mr. Machuca and Campbell erected these pillars, instead of making them rest on the ground

they make them rest upon the stone in the middle of the foundation, don't you think that they made them more strong than what it shows here?

A. Yes.

Mr. CHICOTE: I will continue to-morrow, Your Honor, to examine this witness.

Adjourned to 8.00 o'clock Tuesday, June 16, 1903.

MANILA, P. I., *June* 16, 1903.

(Examination of Major CASE, a witness for the defendants continued by counsel for plaintiffs.)

By Mr. CHICOTE:

Q. Can you speak Spanish?

A. Yes, sir.

Q. Can you speak Spanish sufficiently so as to be able to
73 answer counsel's questions in Spanish?

A. I can understand all of your questions if that is what you mean.

Q. You have stated your answers before that the joints of the pillars, you found them unsafe or insufficient.

A. No, sir, I did not say that they were insufficient; I said that they were not a good joint, but that they could be improved.

Q. How do you think the joints ought to be done in order to be sufficient?

A. They should have straps to reinforce the bolts.

Q. Do you know if in building up government buildings constructed by American engineers there was used this system such as in the Custom House warehouses?

A. I do not; I never examined those buildings.

Q. Do you know how the electric posts and the telephone posts are jointed by the Americans?

A. No, sir.

Q. Do you know that they are also joined by means of two bolts also?

A. Probably so, but I haven't examined them.

Q. The joints of the pillars of this house in question, are the joints superficial or are they joined in such a way that without the bolts they would be strong enough? That is to say, I want you to explain to the court how the joint of one post is made with the other posts.

A. I have got a sketch of that particular joint up there, and that will explain it a lot better than I can talk about it (Showing a drawing of the joint to counsel and the court).

Q. Do you know if the City Engineer requires those straps for the construction of buildings?

A. I cannot answer that question exactly, for I haven't a
74 copy of the regulations here, but I believe that straps are required.

Q. Do you know the conditions of this contract between Messrs. Behn, Meyer & Co. and these parties?

A. I have read them over.

Q. Do you know if there is anything said as to the way that these joints ought to be done?

A. Yes, sir, the specifications should read securely strapped and bolted.

Q. Will you please show me the specifications that you speak of?

A. I should explain in my statement saying "the specification" that it should be the supplementary agreement for changing the posts. The posts were single pieces, I believe, under the first specifications, and then they were changed.

By the COURT:

Q. Then, it was a supplementary agreement that you saw?

A. Yes, sir, it was a supplementary agreement that I saw.

By Mr. CHICOTE:

Q. In your opinion, without these iron straps, would the building lose its strength so that the building will be entirely useless?

A. No, sir, the building would not fall from the omission of these straps, but the joint, however, would not be so strong.

Q. With reference to the doors, you stated there was a defect because no threshold or sill was made. Did you see any building in the Philippines, even those built by the United States, with thresholds or sills?

A. My testimony was misunderstood. I did not say that the lack of the door sills was a defect, but only explained how it was possible to reach under the door and open the door with the hand underneath the door.

Q. Do you know what are the dimensions of the doors and
75 windows of the house lengthwise?

A. No, I do not.

Q. Do you know what dimensions were specified in the contract as to the doors and windows of the building?

A. No, sir.

Q. Without knowing what the contract calls for as to the dimensions of these doors and windows, and without measuring them, can you state that the dimensions are not according to the contract?

(No answer.)

Q. On what do you base your opinion that these doors were not built in accordance with the contract?

A. My answer was simply to point out some defects of construction. So far as I remember the contract and specifications, they referred almost entirely to the materials. I believe the materials are satisfactory.

Q. My question was that you stated here that these windows and doors were not built as called for in the contract. How can you swear to that without having seen the contract?

A. I have not said so.

Q. In the construction of a building, and on account of a door

or window being 3 centimeters shorter than they ought to be, do you believe it to be a good reason to reject the building?

The COURT: Well, I don't think that is a proper question. He may go ahead and answer the question unless counsel on the other side objects to it. The objection to the question is that it asks the witness a question of law as to whether it would be a good reason for rejecting or not. The court can hear the testimony with reference to conditions, the facts being applied to the issue made, and the courts are the proper ones to determine whether it is a good ground of objection or not to object or not.

76 A. No, sir.

Q. Can you name each one of the specifications of the contract and also state which one of these specifications were violated? Just name one by one,—not as defects counted by you, but I mean the violations of the specifications, if any.

Mr. KINNEY: You have a right to look at the specifications.

Mr. CHICOTE: Why, if Your Honor please, before any paper can be used by a witness to refresh his memory, that paper must be introduced in evidence before it can be used.

Mr. KINNEY: This is a copy of the specifications that we used yesterday. The objection to the question is that there has been no evidence here of any violation of specifications except one, and until we assail the specifications as not having been complied with, a question to prove that they have been complied with is not competent, because he is not called upon to prove that. The only proof of any failure to comply with specifications is that with reference to the strap which has been testified to. Major Case, our only witness thus far who has been on the stand, says that the specifications have been substantially complied with. We are not alleging anything more than has already been testified to, and it is not incumbent upon him to prove that they have been complied with until we say that they have not. Our contention is that the specifications have been complied with, but not in a workmanlike way; and for him to undertake the negative, so to speak, when he is not called on to prove it, makes the question inadmissible.

The COURT: He can ask the witness with reference to the construction and let the court take the specifications and see whether the construction was in compliance with the specifications.

77 I sustain the objection.

Mr. CHICOTE: To which ruling of the court the plaintiffs except.

Q. The defects that you mentioned here and testified to are defects in your opinion only; they are not violations of the contract and specifications, are they, isn't that a fact?

A. They are defects of workmanship, and I have not seen one word in the specifications as to workmanship.

Q. From where did you examine the rafters of this building?

A. I was in the house, in the attic, right up next to them.

Q. In what part of the house?

A. I say I was in the house right up next to them, and had my hands on the rafters examining them.

Q. Do you know the kind of timber used in these rafters? A. No.

Q. According to the specifications of the contract, is it not a fact that lumber of the third group should be used for these rafters?

A. Yes, sir.

Q. Is it not true that generally lumber of the third group is lighter than the other group, that is, more spongy or porus?

A. Yes, sir, more so than the higher groups, higher than the third.

Q. Is it not a fact that lumber of the third group, on account of being spongy, that during the heat this lumber shrinks and swells?

A. Yes, sir, it is a fact.

Q. Is it not a fact that on account of this condition of this particular kind of lumber they cannot be tightly adjusted to each other so as not to leave any space or opening at the joint?

A. Yes, it would be difficult to make a joint which would remain joined. The joint could be tight, but it might shrink and open and close again.

78 Q. Is it not also a fact that this lumber, after being tightly jointed, that after some time they would part from each other if not banded, that is, warp?

A. Yes, sir.

Q. Did you not say that, in your opinion, the sand used there had 15% of stuff other than sand, and that in a cubic foot of sand you must give a deduction of 15% in order to have exactly a cubic foot?

A. No, sir.

Q. What did you state with reference to the sand?

A. I said that in making a fill, depositing sand which has been dug, that to get the actual quantity of sand that was put into that place you must allow a percentage for settlement, because in course of time this sand keeps on compacting, getting down to a final bearing, and it was 15% that I considered sufficient to allow for this sand.

Q. Would you allow the same percentage for dry sand with — recently taken from the sea, that is, wet sand?

A. There is probably a difference; there is a difference between wet sand and dry sand.

Q. Do you know whether the difference in percentage is double or much more than double between dry and wet sand?

A. No, it is not.

Q. What is the difference, according to your experience, between wet sand and dry sand with reference to the percentage?

A. The question cannot be answered in that way. I cannot get at what you mean exactly. If it were perfectly dry sand and you wanted to settle it, you would wet it to make it compact; that is all I can say about it.

Q. To compact the sand you have to dry it?

A. No, you have to wet it.

Q. A cubic foot of sand, if it had 30% of water, would you have a cubic foot also or would you have more than 1 cubic foot
79 of sand?

A. That depends entirely upon the grade of sand. You might have a grade that would hold more than 30% of water, and t-en you might have a coarse grade that wouldn't hold 30%.

Q. Do you understand French?

A. I can read it a little, but cannot speak it.

Q. Do you know some of these French authors, such as J. Claudel and La Barre?

A. I have never had the pleasure of reading them.

Q. Have you ever heard of the French authority by the name of Philippe Hugenin?

A. No, I have never met him.

Q. What authorities on civil engineering have you studied?

A. Do you want the names?

Q. Well, names and nationalities?

A. John C. Trautwine, Prof. Merriman, Prof. Bird, George S. Morrison, and Clemens Hirschel.

Q. That is enough. And do you believe the theory of the author of this book, Huguenin, is wrong when he states here that ordinary sand contains from 10 to 20 per cent. of other stuff than sand itself?

A. Let me correct that. That means voids, empty spaces in the sand.

Q. Yes, space.

A. The author is certainly correct in making that statement.

Q. Now, what do you have to say about the following statement of this author, Claudel, "My experience with the sands of rivers where the greatest variation of the size is from 1 millimeter to 1 millimeter and a half for a given volume, there are voids of from 31 to 38 per cent.?"

A. That is no doubt correct. It is the experience of the author.

Q. Is it the same thing to deposit sand in a dry place as
80 in a wet place?

A. I think I understand what he means. No, of course not; there is a settlement which takes place in the soft material.

Q. Is it not true in depositing sand in a made piece of ground that gradually the water would absorb the sand?

A. No, that is not it. The sand will displace the water, yes.

Q. Is it not true that to fill up a large boggy piece of land with sand, you cannot measure it on the face of the land, but you must go down to the bottom as far as the sand settles?

A. Yes, sir, you must measure the sand down to where the old soil shows that it has been compacted and the sand does not go any further.

Q. In your examination of this sand, did you endeavor to find the solid part of the land?

A. I measured to the land distinctly marked between the sand and the compacted black dirt of the paddy field.

Q. Did you measure or did you calculate the amount of sand that has disappeared and become mud?

A. That question cannot be answered, sir; it does not mean anything.

Q. The question is, did you calculate the amount of sand converted into hard land?

A. I cannot answer that question by saying yes or no. You ask if I have calculated the amount of sand that has gone down to make that bottom hard. I answered that question before, that I measured from the top of the sand to the line between where there is any sand and where there isn't any.

Q. Is it not true that wet clay increases in its volume from 60 to 65% when it is totally wet?

A. It will be necessary to explain what is meant by the void in earth, either in sand or in clay. The question refers to clay,
81 and I will answer that. The voids in a certain volume of earth, clay, in place are caused by the leaking of the rain water and other waters passing through it and washing out the soluble substances in the clay. It leaves a certain per cent. of voids. In one place in the world it may be three or four times as—where there has been a good deal of water—as much as in another place. Certainly. You ask if it is true that some clays have 60 or 65%. I answer, yes, it is possible. I must make that explanation.

Q. You said you went around the lots and measured it until there was no more sand.

A. Yes, sir.

Q. Then it is your opinion that there was no more sand below the point where I mentioned?

A. No, I do not believe there was sand below it.

Q. Did you find mud or earth?

A. It is earth, though it is wet. There is water in it.

Q. Is it muddy?

A. No, it is compacted from the wet on top of it. It is hard now.

Q. Do you believe that it was the former earth of a grass field?

A. Yes.

Q. On what do you base this opinion?

A. The filling was all of sand; the bottom under the sand is all of clay; the clay is there and it must have been there before the sand was put on, so I concluded that it was the original soil.

Redirect examination by COUNSEL FOR DEFENDANTS.

By Mr. KINNEY:

Q. Major Case, you stated in answer to a question by Mr. Chicote that the timber of the character that the joists in this house were made of was susceptible to the influence of the weather and
82 would at certain times expand and at other times contract. Is it not a fact that that expansion and contraction does not apply to the grain of the wood? It would not become longer or shorter, but would become narrower or wider?

A. That is approximately correct. The shrinkage or expansion longitudinally in the direction of length is very small in any timber. It may be quite large sectionally..

Q. Now, if this sand, Major Case, which was upon the land was wet at the time it was put on the land, would not the shrinkage in it be less than it would be ordinarily if it had been put on dry and subsequently made wet by the elements or by having water poured on it?

A. I cannot definitely answer that question, because it depends in a measure on how the sand was deposited. Generally speaking, wet sand compacts more and would settle less. You are right, generally speaking, I suppose that is what happened there, but I cannot testify that it did happen, but the difference would be in the advantage of the wet sand.

Q. Wet sand, generally speaking, would shrink less than dry sand?

A. Yes, sir.

Q. Well, if this sand followed the ordinary rules and habits of other sands, the shrinkage which you have allowed would be more than adequate?

A. It certainly is ample, is adequate.

Q. Now, what would be the effect, granting that this field was wet at the time that this sand was put on there, when the sand is deposited? What effect does that have upon the water which may have been upon the land, what direction does the water take?

A. The sand displaces the water, and its first tendency is to rise; the water may run off then.

83 Q. The water is then absorbed by the sand?

A. No, not absorbed, but displaced by the sand. A portion of it stays in the sand and the balance will run off in any direction where it can.

Q. Now, as that sand was put on there, as it appeared to you when an examination was made, when the holes were made, are you satisfied that you got down as low as any sand could be gotten when you got down that fill?

A. I am.

Q. Are you satisfied that you made the measurement from the very bottom of the level of the sand to the top?

A. I am satisfied.

JOHANN MENZI, a witness called on behalf of the defendant-, being first duly sworn, testified as follows:

By Mr. KINNEY:

Q. Mr. Menzi, where do you reside?

A. Calle Arvilles.

Q. What is your occupation and by whom are you employed?

A. I am employed by Behn, Meyer & Co.

Q. Are you familiar with the land on Uli-Uli owned by Behn, Meyer & Co.?

A. Yes, sir.

Q. State to the court just the situation of that land, how it is surrounded.

A. On one side is the palace of the Governor, on one side is the street of Uli-Uli, on one side is the private street of Don Miguel Velasco, and one side is the river front.

Q. Were you familiar with the appearance and topography of that land prior to that time? that is, when the house was built on it and the sand placed on the land?

A. Yes, sir.

84 Q. Describe to the court the condition of that land as to its topography prior to the building of the house and the putting of the sand upon it.

A. It was a zacate field, a grass field.

Q. Well, describe whether it was——

A. And it was an even grass field, divided, as far as I remember, into four parts.

Q. What do you mean by "even"? Level?

A. Level, yes.

Q. What opportunities had you for knowing how that land did lay?

A. Well, I have been in Manila six years and I passed there very often. I used to live in Nactajan, and had to pass there every day for about one year, and afterwards I passed sometimes.

Q. Were you with Behn, Meyer & Co. when this land was bought?

A. Yes, I was with Behn, Meyer Co. when this land was bought.

Q. How often did you see it after it was bought by Behn, Meyer & Co.? Up to the time the sand was put on it and the building was done?

A. Very few times.

Q. You did see it, however, between that time?

A. I did see it, yes.

Q. Now, with reference to the road, is it Uli-Uli that passes in front of it?

A. Yes, in front of it.

Q. Was the level of that field above or below the road, Uli-Uli, at the time it was bought by Behn, Meyer & Co.?

A. I don't know that exactly, as now the street has been raised already very much.

Q. Well, just give your recollection.

A. I couldn't tell you if the street had been raised already when Behn, Meyer & Co. bought that territory.

85 Cross-examination by COUNSEL FOR PLAINTIFFS.

By Mr. CHICOTE:

Q. Have you ever measured the depth of this grass field?

A. No.

Q. At the time the house was constructed, were you in Manila?

A. I was in Manila.

ROBERT M. LOPER, a witness called on behalf of the defendants, being first duly sworn, testified as follows:

By Mr. KINNEY:

Q. What is your profession, Mr. Loper, and what official position do you occupy, if any?

A. I don't claim any profession. My experience has been that of mechanical engineer, and I am now employed as Inspector of Buildings for the City of Manila.

Q. Are you familiar with the property which has been called here the Behn, Meyer & Co. property on Uli-Uli next to the Malacañan Palace?

A. I am.

Q. Did you make an examination of it at the request of Behn, Meyer & Co. for the purpose of passing on the condition of the house?

A. I made a careful examination of it.

Q. State to the court the result of your examination so far as it pertains to the manner in which the house is constructed?

A. My examination was not made at all with an understanding as to the terms of the contract; it was simply to determine the actual condition of the house as it now is. I found by examining the foundations of five posts carrying the greater part of the weight of the building that the foundations for the posts were respectively a half meter below the bottom of the post for three of the posts, or three layers of Guadaloupe stone; for the fourth post four layers
86 of Guadaloupe stone, or, say, approximately about 65 centimeters in depth. On the southwest side of the building, the foundation under the post that was exposed there was considerably deeper—six layers of Guadaloupe stone underneath the post, or, approximately, one meter. It was a full meter. There were several minor defects that were noted in the workmanship, to which I didn't attach any special importance. The splices of the posts were short. They were fastened together with two bolts, two five-eighths inch iron bolts. In my judgment, it wasn't a strong splice, not as strong as is usual to put in Manila. The condition of the roof structure, the frame work of the roof, showed that there had been a settlement of the building, which I didn't consider at all unusual, inasmuch as we expect buildings to settle some; but the settlement of the building showed the indisputable fact that the post carrying the main wall of the building had settled considerably more than the other post, as evidenced by the fact that the second floor was dished in or depressed in towards the center from the outer porch floor, the result of which would be that any water getting in any way upon the porch floor itself would flow into the house. I didn't think that the foundation had been sufficient. The post splices, I think, were not as they should have been. Whether they complied with the contract or not is for the court to determine. I have nothing to do with that. I didn't think they were sufficient to maintain the building in a good, firm, substantial condition for a reasonable length of time. The evidence of the building having settled was further manifest by the fact that the rafters in every case, in some

cases more than others, but in every case they had pulled
87 away from the king post.

Mr. CHICOTE: The principal question in issue is whether or not this work has been carried on according to contract.

The COURT: I think it is all right. It is his business to state how the work was done, and then the court will take the contract and see whether the work was done in accordance with the contract. I overrule the objection.

Mr. CHICOTE: Exception.

The WITNESS: I saw quite a number of little things to which I don't attach any importance, inasmuch as the work in Manila here is not done in the same manner that we do work in other parts of the world, in the United States or Europe. Such points have been testified to; but so far as the present condition of the house is concerned, the foundations under it were not sufficient. The splices in the posts were not as is usual in the practice here in Manila; they were short. The result of their being short would be that they would stand considerably less strain than if the splices were long.

Q. Were the posts strapped?

A. The posts were not strapped, no.

Q. What was the condition of the floor of the second story?

A. The floor of the second story seemed to have been taken up and relaid; the spaces between the floor boards themselves were not unusual; the spaces were there, the result due to the shrinkage to the lumber, but apparently the floor had been taken up and relaid in parts, and, of course, suffered a slight damage due to that fact, that it had been taken up and relaid.

Q. Did you make an examination of the roof and rafters?

A. I made a careful and very unpleasant examination of
88 the roof. The workmanship of the roof construction possibly is the worst part of the building, that is, the workmanship in the roof construction probably might be classed poorer workmanship than the rest of the building.

Q. In what respect was the workmanship poor?

A. Well, the joints between the roof timber seemed to be poorly effected, poorly made; some of that I attributed to the class of timber that was used—a very small part of it—but more particularly to the settlement of the building.

Q. What about the carbolineum?

A. You mean what is commonly termed rubberoid. Carbolineum is a fluid.

Q. Well, the rubberoid?

A. Rubberoid had been tacked to the underneath side of the rafters. It wasn't manifest just for what purpose it had been put there. It may have been put there to keep out the heat, which was, I suppose, the reason for putting it there, or there might have been some other reason for putting it there. The condition of the rubberoid seemed to be very bad indeed; it looked in very bad shape; it was in horrible shape; in as good shape though as you might expect it put on in that way.

Q. Judging by the conditions which you saw in the examination made of that house, would you call it a workmanlike job or not?

Mr. CHICOTE: I object to the form of the question.

The COURT: I overrule the objection.

Mr. CHICOTE: Plaintiffs except. I will state the reason. The witness introduced by the defense is testifying to the condition of the house at Uli-Uli and also whether it is well or badly built. He cannot testify on this point unless he is familiar with the
89 contract entered into between both parties in this suit for the construction of the building. He will give us no information in this case whatever by the statement of the witness that the house was not built in the same way as the White House in Washington, for example; and, besides, I understand that the court directed me to make all my questions refer to the contract, that is, whether the contract was faithfully fulfilled or not.

The COURT: You misunderstand the court. I said a half dozen times that it is not the business of the witness to state what the contract is; it's the business of the witness to state, if he knows, how that work was done; then it's the province of the court to take that fact, testified to by the witness, and the contract and determine whether the work was done in accordance with the contract. A witness does not construe a contract.

The WITNESS: If by workmanlike work is meant work that is done by a good carpenter, I would say it wasn't a workmanlike job.

Q. Well, what does workmanlike mean in your business?

A. Workmanlike is always considered, I believe, by professional men and by those who are not professional men as being that the work is perfomed in the manner in which a good workman would do it.

Q. Did you make an estimate, Mr. Loper, what it would cost to make the necessary alterations and repairs in order to put that house in the condition it would have been in if it had been constructed in a workmanlike way?

Mr. CHICOTE: I object to the question as being immaterial and irelevant. The counsel is asking the witness to state how it was erected. How can the witness know how the house should be erected?

90 The COURT: I will overrule that objection. That is a proper question; and, on cross-examination, you may test the witness's knowledge and his capacity for what he states in his examination in chief. I overrule the objection. Let the witness answer the question.

Mr. CHICOTE: I except to the ruling of the court. My exception is that the witness stated he didn't know anything about the contents of the contract, so therefore he would not be able to state in what condition the house should be erected.

The WITNESS: I did make an estimate of what it would cost to put the house as it now is in such a condition as a house of like material, size, and approximately the same cost should be in at the

present time had it been constructed in the manner that such a house should have been constructed.

Q. State what that estimate was, Mr. Loper, and how you arrived at it.

A. Before giving the estimate, I would like to say that I must confess the impracticability and almost the impossibility of putting the house as it now is in such a condition so that it would be acceptable to anybody that had originally expected to have a house erected so that when it was finished it would be accepted; if you understand that. It is practically impossible to answer that question inasmuch as the personal equation comes in. There are some people who would be satisfied with very slight repairs; but to put that house in the condition so that it would be in the condition that a house would be in had it been constructed like a house of that sort and approximate cost should be in at the present time, I figure that the comparative value between materials and workmanship—now I mean materials in their present condition; you will understand that materials
91 in their present condition might represent considerable work:

For instance, the doors might have all been built up. They are made of wood. The value of the wood represents only a part of the value of the finished doors in their present condition, and the finished doors, of course, would be used in the reconstruction of the house just as they are now. They would be re-hung, but the door, as it now stands, is considered a finished material. Upon that basis, I took the finished materials as they now exist in the house, which would approximately represent about 65% of the value of the house—of the materials and labor; that the labor would represent 35% of the value of the house. To do the work that would be necessary to put that house in the condition mentioned; it would be practically necessary to put that house in the condition mentioned, it would be practically necessary to tear down the entire house with the exception of the framework, because I do not believe the foundation is sufficient to carry the weight of that building upon the soil that exists there. The tearing down of the materials and replacing them, of course, there would be some damage to the material. It would probably be necessary to replace 15% of the present materials by new materials, because they would be damaged in the reconstruction. If the original value of the materials is taken at 65% and it would be necessary to replace 15% of them, the value of the replaced materials would represent 15% of 65%, or 9¾% of the total value of the house. The estimate that I made as to the amount of labor required for doing the necessary work was that it would be about one and a half times as much work to tear down that house and put it in the condition mentioned as it would be originally
92 to build the house, having the finished materials furnished.

If 35% represents the percentage of labor in the house originally, and it is estimated that one and half times that would be the amount of labor required for putting the house in proper condition, that would result in an estimate of one and a half times 35%, or 52½% for labor; 52½% of the value of the house; 52½% for labor; and 9¾% for necessary materials, that would have to be fur-

nished to replace damaged materials, would result in a total estimate cost, to put the house in such condition, of 62¼% of the total value of the house. I do not consider that doing such a thing—I feel in justice to myself I ought to make this statement—I made it before—I do not consider that such a thing would be a wise thing to do.

Q. Assuming that the contract price of this property was about $20,000, your estimate is that it would require about 62½% of $20,000 to put it in the condition it should have been in to put it in a workmanlike way?

A. My estimate means that if the original contract price of the house should have been $20,000, if would cost 62½% of $20,000, or $12,450, to put it in the condition as I mentioned.

Q. Do you know of any more economical way of putting the house in the condition in which it would have been if it had been constructed in a workmanlike way?

A. I do not.

Q. In the examination which you made of the house, Mr. Loper,—you and Major Case made the examination together, did you not?

A. We did.

Q. And agreed between yourselves about what was the best solution in your judgment?

A. We consulted together about the facts as we had per-
93 sonally observed them, with a view to arriving at the true facts so far as the facts were examined. As to the estimate, I believe I myself suggested the method of arriving at such a——

The COURT: I don't think that any conversation which occurred between you and him would be proper.

Q. Did you yourself, Mr. Loper, make a survey of the superficial area of the Behn, Meyer & Company property?

A. I did.

Q. Did you yourself make an examination of the depth of the filling?

A. I did.

Q. Did you yourself compute the quantity of filling which had been placed upon the land?

A. I did.

Q. Will you please state to the court the result of your survey, measurement, and computation?

Mr. CHICOTE: I object to this question, your Honor, for the reason that it has not been established that this witness is an expert on this line. He cannot testify about these things until that fact has been established. He was asked his occupation, and he said he was a mechanical engineer.

The COURT: If this witness measured and was able to measure the amount of sand or filling that was put on the land there, I think it is competent to ask him the question. I overrule the objection. Let the witness answer the question, and you may cross-examine him.

Mr. CHICOTE: Plaintiffs except.

Q. Before answering the question, Mr. Loper, will you state whether or not you have taken a course in civil engineering?

A. What is called a short course. In the United States
94 and in Europe as well,—more particularly in the United States,—any engineer of one particular branch of science is supposed to be familiar with the general principles of other branches of science,—general principles, to this extent: that a mechanical engineer who didn't know anything at all about a transit or who didn't know anything at all about the measurement of angles would be no mechanical engineer at all. A mechanical engineer who didn't know the same mathematics that the civil engineer knows would be no mechanical engineer at all. A mechanical engineer who didn't understand trigonometry and the measurement of angles and the relation between sides and angles and triangles would be no mechanical engineer at all. In every branch of science there is a certain amount of knowledge that is in other sciences.

Q. Now, state your answer to the question, that is, what did you discover the area to be, the depth of the filling, and the quantity of the filling, and how you arrived at it; and if you made any notes on the subject, of course you can refer to them.

A. I have field notes here. I made a survey of the property in question, and the calculation shows that the property contains a total area of 16,549.62 square meters, superficial area. Six holes were dug from the surface down through the sand filling that had been placed upon the property down to the alluvial soil where the compacted earth—the original soil—down through that soil so as to make sure that the original soil had been reached. The depth of filling, or, as you might term it, the thickness of this filling, as indicated by these holes, was approximately in the first hole 1.15 meters, in the second hole 1 meter, in the third hole 1.15
95 meters, in the fourth hole 1 meter, in the fifth hole 1.20 meters, and in the sixth hole a depth of 85 centimeters. The depth of this sixth hole I did not think, inasmuch as it was less than the apparent average depth of the whole filling; should be taken into consideration: for this reason, that the other holes were distributed and covered approximately the whole area, covered each part of the area. The sixth hole was located near the banks of the river, and, as is known by engineers, no matter whether they are civil or mechanical, the banks of all rivers flowing through alluvial soil, understand, are always higher than the adjacent property, always higher; so that would indicate the reason why this sixth hole should be of less depth than the other. The calculation——

Q. Let me interrupt you right there. If you had included the sixth hole in your average, would the result have been a greater quantity of sand or a less quantity?

A. It would have shown a less quantity of sand; it would — shown an average of 1.6 meters; but, for the reason I gave, I do not think it fair to the plaintiffs to take the depth of this hole into consideration, for the reason that I gave. Having found the superficial area of the property in question to be 16,549.62 square meters, the average depth of 1 meter and 10 centimeters, the question was

to arrive at the amount of a shrinkage that would take place in land so deposited. The amount of shrinking of sand ordinarily in railroad work is taken from 8 to 10 per cent. shrinkage; but inasmuch as the entire soil underneath this sand showed that it had been moist, that there was considerable water there, I took the shrinkage to be 15 %;

96 taking the average depth at 1.10 meters and allowing for a shrinkage of 15 %, we would find that the depth of filling when it was originally placed may have been 15 % more than 1.10, or 1265 millimeters, or 1 meter and 26½ hundred-s of a meter. A calculation, taking the superficial area and multiplying it by the ascertained depth of this fill, or average thickness of the fill, showed that the amount of sand that had been deposited upon this property must have been 20,935.27 cubic meters deposited on the land of sand or fill.

Q. Is there any doubt in your mind, Mr. Loper, that you have given the outside quantity of sand which could have been deposited on that property from your calculation?

A. A very slight doubt.

Q. Within what per cent. could you be mistaken?

A. Certainly not more than a maximum of 10% and only as much as ten per cent., inasmuch as five or six holes dug over an area of that size should not be taken as absolute evidence that there wasn't a ditch or a water course or something or other running through the property, making a slight depression; but any such difference could not amount to more than 10 %. The fact of the water being there would make no difference as to the amount of fill; it would be just as easy to calculate it, but through holes we might not strike a depression or a channel that had been occupied by the water.

Q. On the other hand, if there were any mounds or fillings on the land, then your calculation would be too much?

A. Assuredly so.

Q. On the assumption, Mr. Loper, that that property was aproximately level when the filling was put on there, are you certain that the quantity of sand which you testified the filling amounts to is all that was put on it?

97 A. Beyond a doubt. If the land was level, there can be no question as to the amount of filling that was put on there.

By the COURT: How much filling did you say there was?

A. 20,935.27 cubic meters.

By Mr. KINNEY:

Q. Mr. Loper, what, approximately, would have been the difference in the thickness of this filling over that area if 64,000 cubic meters of sand had been put on it?

A. 64,000 cubic meters of sand placed upon that area would give a thickness of fill, ignoring for the moment the question of shrinkage, of 3 meters and 89 centimeters, or approximately 12 feet and 9 inches. If you are going to allow a 15 % shrinkage, it would be approximately 11 feet thick or 3 meters and about 30 centimeters thick.

Q. And the thickness that your measurements disclose was 1 meter and 15 centimeters at the deepest hole?

A. 1 meter and 20 centimeters; an average of 1 meter and 10 centimeters.

Q. Is there any doubt in your mind that you discovered the bottom most depth of the sand?

A. None whatever.

Cross-examination by COUNSEL FOR PLAINTIFFS:

By Mr. CHICOTE:

Q. Are you a mechanical engineer?

A. I am a mechanical engineer without the title. I have had the experience of a mechanical engineer; that is, I hold no diploma from any technical school.

Q. Are you a civil engineer?

A. Not a civil engineer: same explanation.

Q. Are you an architect?

98 A. I would like to have that question explained. What do you consider an architect? I cannot answer that question unless I know what you mean by an architect. I will explain that a former witness on the stand stated he was an architect, but to my personal knowledge he wasn't an architect at all. I don't care to make the same mistake.

Q. Then you know what an architect is?

A. Certainly, I know what should be called an architect.

Q. I am asking you whether you are an architect or not?

A. I do know what I call an architect.

Q. Are you an architect?

A. I am not a graduate of any school of architecture.

Q. Are you a chemist?

A. No.

Q. Did you study in any schools such as civil engineering or mechanical engineering?

A. Yes.

Q. What study did you make and where, what course did you take and where?

A. I took the course in mechanical drafting and engineering.

Q. In what school?

A. In the West Jersey Acadamy, Bridgeton, New Jersey, United States of America.

Q. How many years were you in that school?

A. Four years in the school.

Q. And you didn't get any diploma?

A. I did get a diploma.

Q. Diploma of what?

A. As passing the course of study as set forth in the curriculum of the school.

Q. My question is whether or not you obtained a diploma as a mechanical engineer or a civil engineer?

A. I didn't obtain a diploma as an engineer at all. I stated in my former testimony that I didn't obtain a diploma of any engineer.

Q. At what age did you begin these studies?

99 A. At the age of thirteen in the school.

Q. How old are you now?

A. I will be thirty-four on the 13th of August of this year.

Q. Where did you practice as a mechanical engineer?

A. I was mechanical engineer for the Long Mead Iron Company at Coshocton, Pennsylvania.

Q. What kind of business have they?

A. They are manufacturers of iron pipe and fittings.

Q. Were you a mechanical engineer there or assistant?

A. I was mechanical engineer absolutely in charge of the erection of a new mill and the designing of all the machinery for making pipe upon an entirely new process and using entirely new machinery; an investment of about $100,000. I was a mechanical engineer in charge of all the work, including the erection of the building.

Q. Did you ever practice as a civil engineer?

A. I don't know what is meant by practicing as a civil engineer.

Q. The question is, did you at any time do the work of a civil engineer?

A. Did I ever perform the work of a civil engineer?

Q. Yes?

A. I had.

Q. What work did you do as a civil engineer?

A. The work that I performed as a civil engineer I would state as being in charge of the erection of the building and the foundations for the building, which would require a knowledge of science which is generally put in the civil engineering branch of science, understand; that is, the nature of soils, the nature of the necessary work to be done upon certain soils for the erection of foundations of any description.

Q. How long have you been in the Philippines?

100 A. A year and four months.

Q. Did you at any time in the Philippines perform the work of a civil or mechanical engineer?

A. Not unless my present work may be considered work of either of those particular branches of engineering.

Q. What work do you do now?

A. I am inspector of buildings. I have charge of the designing, drawing the specifications for all of the proposed municipal buildings. I have charge of the inspectors who are to see that the city ordinances regarding the erection of public and private buildings are enforced. I, of course, perform the duties of the chief of that particular office.

Q. How long is it since you have that position?

A. Since March 13th of this year.

Q. And before this time did you have any experience with the work you are now performing here in the Philippines?

A. Here in the Philippines, none whatever.

Q. Do you know the different kinds of lumber here in Manila and their prices too?

A. Well, I know them, but not very well. Nobody knows them very well. I don't know them very well.

Q. Will you please explain to the court what is the difference between lumber of the first group and that of the third group and how you will find out which belongs to one or the other, and also the different prices between lumber of the first and third group and their condition, and so forth?

A. The difference between lumber of the first group and lumber of the third group, in general, is in the matter of its density. Whoever perfected the present nomenclature of the woods of the Philippine Islands had to take as a basis some particular
101 feature or nature of the woods. It is manifest to me from an inspection of the classification that the particular quality of the wood that was taken into consideration in the group of these timbers was their density. As to the price, I would say that the price of lumber in the third group in the Forestry Bureau classifying these woods is stated to be—this is the first group—is stated to be approximately about $1.50 gold per cubic foot. Such may be bought in the market from 2½ to 3 pesos Mex., according to the condition of the market. The lumber of the third group can be bought approximately for 25 cents per cubic foot, gold, less.

By the COURT:

Q. What do you mean by density?

A. Density would be the close grain of the wood; not absolutely. The grouping, if I can continue the answer to that question, Judge, I might say that there must be some arbitrary standard to judge these woods by originally. The standard must be established arbitrarily, inasmuch as we can take a wood from the second group which can be proved superior for certain uses than any wood in the first group or the superior group; you can take one from the second group and you can prove it to be superior for common, ordinary purposes to any lumber in the superior group. There are many timbers in the first group and in the superior group which are practically good for nothing to be used as beams or to be used as materials to support a transverse strain. They are all right as columns to support weight, but they are practically of no account to support a transverse strain in which the strain put upon the transverse of the timber is both tensile and compressive.

Q. Did you make an examination of the building belong-
102 ing to Behn, Meyer & Company in Uli-Uli?

A. Yes, sir.

Q. Can you state approximately how long since that house has been built?

A. From my own knowledge I cannot.

Q. Well, what information did you have as to how long this house has been constructed?

A. The information I have is that the house was finished by May first of last year, 1902.

Q. Do you know what kind of lumber was used for the construction of this house?

A. In general, yes.

Q. Do you know the name of the lumber?

A. I do not.

Q. Do you know to what group this lumber belongs?

A. I couldn't state positively to which group it belongs, but I know from the nature of the wood about what group it should be put in in the classification.

Q. Well, to what group?

A. My impression is that it is lumber of the third group, with some few exceptions. The frame work of the building and the roof construction I believe to be lumber of the third group; some of the doors are possibly lumber of the first group, and some of the trimmings may be of the first group, and some of the lumber may be of the second group.

Q. Do you know what was the agreement had between the parties with reference to the construction of this house?

A. In general terms I know the agreement that was entered into between the parties.

Q. Well, what do you know about it?

The COURT: Are you asking him about the contents of the contract?

Mr. CHICOTE: No, I am just only asking what he knows about it in general.

Mr. KINNEY: He doesn't know anything of his own knowledge.

103 The WITNESS: Certainly not. Does the court want me to tell all that I know about this matter? That is a pretty broad question; it might take me two or three hours to tell all I know about it. If counsel will confine himself to something definite——

The COURT: I will say that you will not be permitted to state what the written contract between the parties contained. If there is any controversy about any verbal agreement that you know anything about——

Mr. KINNEY: He knows nothing of his own knowledge about it at all.

Q. You say you know in general terms the nature of this contract. Now, state what you know about it.

A. Well, I know that for one thing the house was to be built for a certain price and that the foundations were to be approximately 1 meter by 1 meter by 1 meter. The post foundations were to be 1 meter by 1 meter by 1 meter.

By the COURT:

Q. Now, do you mean to say that that is the written contract; for example, that by reading that you got a general idea of what the general contract was?

A. Your Honor, I have read what was said to be the contract.

The COURT: And from that you get a general idea? Well, that is not competent. The contract shows itself.

By Mr. CHICOTE:

Q. You stated that this house was not built in a workmanlike manner. Will you state what you found wrong with that building?

A. The joining together of the roof timbers wasn't done in what I would call a workmanlike manner. The joints were not well made. As a matter of fact, I didn't make any such statement, but I am willing to let that go.

104 Q. From where did you make an examination of the roof?

A. Right up next to the roof, crawling around under the rafters and placing my hands upon them, making a careful examination of the joints.

Q. At that time were you together with Major Case?

A. Not when I made my examination of the roof timbers.

Q. When you made the general examination of the building, did you make it in company with Major Case?

A. Major Case was on the premises. I just stated that Major Case wasn't with me when I examined the roof timbers.

Q. Well, when you made the general examination of this building, whether or not you made it together with Major Case?

A. Major Case was there.

Q. What I mean is whether or not both of you made the examination at the same time?

A. Major Case's examination had nothing to do with my examination. I cannot see with Major Case's eyes. My examination was made with myself.

Q. Now, the survey you made of the land, did you make that all by yourself or together with Major Case?

A. Major Case was there. I myself got down in about three of the holes and measured the depth. In probably two of the other holes I held one end of the measuring stick and Major Case held the other, but in either case both ends of the measuring sticks were observed by myself before any field note was made as to the depth of the hole.

Q. Who examined or measured these holes—you or Major Case?

A. I examined them. I can't tell what Major Case did. I examined them for myself.

Q. Do you know who opened those holes?

105 A. Yes, I know the men who did it; I don't know their names. They were Filipino laborers or Chinese laborers, I don't just recall which, but we had laborers there to open those holes.

Q. At the time these Chinos were making these holes, who were directing them?

A. Well, we were there together. We would all give them instructions. If I would go down in the hole and find it wasn't quite deep enough for the purpose of investigation, I might direct

them to dig it deeper, and they would go down in the hole and dig it deeper.

Q. In measuring these holes, did you simply stick a piece of iron bar down to find out the depth of it?

A. I did not stick an iron bar. I believe we used a long rule 1 meter in length.

Q. Did you yourself or Major Case go down in the hole?

A. I stated that in about three or four of the holes I went down myself.

Q. When you went down the holes, will you state what kind of a soil you found down there—soft, hard, or what?

A. The soil of the bottom of the hole was reasonably firm.

Q. Was it sand?

A. Very, very slightly mixed with sand. No more sand than you can find in soil.

Q. Did you make a chemical examination of the soil you found down there?

A. Chemical examination? I didn't even know it was possible to make a chemical examination of anything like sand.

Q. Of the earth, of the soil, why did you state there was very little sand? On what do you base your authority in stating there was very little sand?

A. Simply because the soil showed for itself that it was not a sandy soil.

Q. But there was sand there enough, a little?

106 A. I couldn't say there was sand there. I presume there was sand there just as there would be a small percentage of it in other soils.

Q. What reasons have you to state that the bottom of the hole which you entered was the original level of that land?

A. The line of demarcation between the sandy soil which was above and the strata of alluvial soil was very distinct inasmuch as the alluvial soil showed a black line very distinct.

Q. Then you measured that part above the demarcation line and not below the demarcation line?

A. I didn't measure below the line of demarcation, no.

Q. Do you believe that the sand deposited on that property has remained in the same condition as the time it was deposited, that no quantity of it had gone down and mixed with the earth?

A. There are several questions embraced in one. The sand, of course, is not in the same condition.

The COURT: He means evidently whether the sand had penetrated the original soil there?

The WITNESS: Any filling that is put upon any soil will not penetrate that soil. It may cause the moisture to flow off or be absorbed by the upper filling, but sand will not penetrate any soil. The original soil might be so filled with moisture that a depth of a foot of it when a filling is put on can be compacted to a depth of only three inches, but the line of demarcation would not be the original level of the soil with the moisture that was there, but the line of de-

marcation between the filling and the original soil would be down to the compacted soil, not up here.

Q. Is it not true that sand is heavier than clay?

A. Yes, it is true.

107 Q. And then is it not a very natural thing that a lighter thing comes above the heavier one?

A. No, it is not always true.

Q. Can you give me an illustration of a heavier thing going above a lighter thing?

A. Yes, if clay had been below there and the sand had been put on top, according to your question we would find the clay on top. We, however, find the sand on top. If the principle, as you state, should be interpreted literally—I understand the law of specific gravity and know just exactly what it is, and that is, the lighter body will be found above the heavier body—but what the resistance of any body may be to penetration isn't in direct proportion to its specific gravity. If so, you might lay a piece of lead on a piece of iron, and you would find the lead at the bottom. If you should, according to your question, place a piece of lead on a piece of iron, the specific gravity of lead being greater than that of iron, or, in common language, lead being heavier than iron, you would find the lead underneath the iron, if your question should be interpreted literally. You ask if I do not know that it is always true that a heavier body will sink below a light one. I say it isn't always true.

Q. Is it not true when the sand is mixed with clay the sand would not become pure sand any longer?

A. Why, obviously it is true that it wouldn't be pure sand if it is mixed with clay?

Q. Is it not true then that when sand is mixed with clay it would become heavier than the pure sand?

A. Yes, I think it is true.

Q. And in view of all, this theory, is it not true or possible that the soil of the holes which you entered are composed of

108 sand and clay?

A. An examination of the soil above the line of demarcation established the fact visually that there was apparently absolutely no clay in it.

Adjourned to 3:00 o'clock p. m.

Afternoon Session.

Cross-examination of Mr. Loper continued.

By Mr. CHICOTE:

Q. Do you believe it possible on account of rains and also on account of flood of the river the water would wash the sand away?

A. It might be possible to wash sand away if there was any chance of its getting away. By washing it away I do not understand washing it down to a bed of clay or alluvial soil.

Q. Could the rains during the last two years also wash the sand into the river?

A. Practically not, near the river, if there had been anything that might be called a flood, the sand would wash into the river from the point of the water's edge to a point where the angle of slidong, or the friction angle of sliding, would appear on the surface of the sand, no further; furthermore, had such a washing away taken place, the surface of the present filling would indicate that such a — had taken place.

Q. Are you familiar with the fact that that piece of land and other lands near to that piece of land are very muddy?

A. I would like a little explanation of that question. I cannot answer that as it is. It's possible that the interpreter hasn't interpreted the Spanish of it. But the land might be muddy after a rain, as you consider it.

Q. The flood, not mud, I mean flood during the rainy season.

A. Yes.

109 Q. And would not this be a cause for the sand being washed away from the place where it was filled with it?

A. I do not consider that what might be called a flood, referring to a severe rainstorm, would wash away any greater amount of sand than I stated to you in answer to the last question; that is, near the banks of the river where it had a chance to escape. The whole inclination towards the river supposing a great volume of water dropping upon it, would come up to the point at which the friction of sand upon sand would hold in a body. (Illustrating) If here was the level of the river and this was the level of the sand filling, and there was a great amount of water put upon this sand filling here, this corner as represented here would have washed into the river until the angle of inclination of this embankment had reached the point where sand refused to slide along, no further. I can tell you what that angle of inclination is, if you want to know.

Q. What is the height of that land with reference to the height of the street in front of it?

A. I should say the center of the road Uli-Uli is possibly two feet below the level of the fill. I didn't take the levels at all,—may be more or less.

Q. Do you know what is the height of that land above the river level?

A. What level of the river are you talking about? High-water level or low-water level or the mean water level or what water level?

Q. The Pasig river, both high and low water?

A. No. I cannot give you very definite information as to the altitude of the sand filling above the level of the river, but I can give you information as to the sand filling above the natural bank of the river.

110 Q. Well, what is that?

A. The sand filling is 85 centimeters above the natural bank of the river; the depth of the sand filling is 85 centimeters at the river bank, the highest point of the river bank.

Q. Do you mean the upper level or the lower level?

A. I stated that the natural river bank, the soil forming the natural river bank, was 85 centimeters below the level of the sand filling at the top of the filling.

Q. Do you know what is the height of the street above the bank of the river?

A. What street?

Q. Uli-Uli street?

A. I don't know accurately, because I didn't measure it. I can give an expression of opinion, that is all.

Q. Well, what is your opinion?

A. The level of the river is likely to change considerably, the level with the water in the river; I don't believe that I can establish the low-water level or the high-water——

Q. I mean the banks of the river?

A. I should say then that approximately the center of the road at Uli-Uli is on a level with the natural bank of the river, the same altitude from the water level.

Redirect examination by COUNSEL FOR DEFENDANTS.

By Mr. KINNEY:

Q. Mr. Loper, that property is entirely surrounded by a wall, except on the river side, is it not?

A. It is.

Q. The wall is higher than the filling, is it not?

A. It is.

Q. Did you notice any appearance on the river side of there having been any washout or washing away?

A. Practically none. It is impossible to state whether
111 there has been any. Had there been any great amount, it would have been manifested, but a slight washing away might occur without leaving any manifestations of it.

Q. Well, what do you call a slight quantity?

A. Certainly considerably less than 5% of the whole volume of the tract, considerably less than that might wash into the river.

Q. Is there any appearance of any having wasted away?

A. I stated that in my testimony, I think.

Q. Could you state whether or not the land as filled is higher at the river bank than it is at the road as it stands to-day?

A. The level at the top of the filling now is practically level. If there is any difference at all, I should say that the highest point is at the natural river bank. The sand filling is higher, if anything.

Q. That soil being sand, rain would sift through it rather than wash it away, would it not?

A. It depends entirely upon the question of confining the sand. Rain continually beating upon a filling of sand would have a tendency to beat it down into the form of a pyramid, the size of that pyramid being the angle of inclination at which sand would refuse to wash down any further from rain falling on it vertically. Rain falling at an angle might still wash it.

112 ARNOLD DITMAR, a witness called on behalf of the defendants, being first duly sworn, testified as follows:

By Mr. KINNEY:

Q. Mr. Ditmar, where do you reside?
A. At Uli-Uli, Malacañan.
Q. What is your business in Manila?
A. Merchant.
Q. What connection have you with the firm of Behn, Meyer & Co.?
A. Partner.
Q. Did you purchase the land for Behn, Meyer & Co. on which the house is built and on which this filling is made?
A. I did.
Q. From whom did you purchase it?
A. From Miguel Velasco.
Q. Are you familiar with the topography of that land at the time you purchased it?
A. Yes, sir. At that time it was confined on one side by the river Pasig, opposite calle Uli-Uli, to the right by the wall of Malacañan Palace, and to the left by the private road belonging to Miguel Velasco.
Q. What was the topography of the land itself?
A. There were at first four squares of zacate fields, and on that property running parallel to the river Pasig there were seven to nine nipa buildings, nipa shacks.
Q. Aside from these mounds, which divided the tract into four zacate fields, were there any other irregularities in the topography?
A. No.
Q. Just state what sort of a field it was so that the court can understand.
A. A zacate field must be almost level.
Q. State whether this one was or not.
A. Certainly; they were all four zacate fields.
Q. Have you been over the land?
A. Yes, several times.
113 Q. After you bought it?
A. After I bought it.
Q. Were you on it after you bought before the filling was put in?
A. Well, after I bought it, yes.
Q. Since the land was filled, Mr. Ditmar, had it ever been flooded by an overflow from the river?
A. No.
Q. Just describe how the four divisions were made.
A. There were two embankments at right angles.

By the COURT:

Q. Was there a ditch made there?
A. Ther- was one embankment, one on which you could walk right in the zacate fields, and here parallel to the river, there were seven or nine native nipa shacks.

By Mr. KINNEY:

Q. Mr. Ditmar, did you ever accept by any writing or any agreement with Campbell & Go Toaco the house as finished?

A. No.

Q. Why did you refuse to accept it, if you refused?

A. The house had too many defects. I had to live in it, but practically it was not habitable.

Q. What defects in the house were apparent to you?

A. The rain came in through the roof, and rain came in through the doors.

Q. To what extent did rain come in through the roof?

A. I could not measure it very well, but to a very large extent. The furniture had to be removed, or it would have been spoiled altogether.

Q. Did you make any examination of the roof from the inside?

A. Yes.

Q. Well, what observations did you make with reference to the roof when you made the examination?

A. After it was said to be repaired, I went to the roof, and there were two kerosene tins placed under the holes where the rain came in.

114 Q. You said that the water came in the doors?

A. Yes.

Q. Describe it.

A. Well, the balcony goes sloping in that direction; consequently, when the rain comes on to the balcony it must run with the slope into the dining-room. Furthermore, there used to be a big pool of water in front as soon as the rain came. It was sloping too, and the water couldn't run off.

Q. In front of what?

A. In front of the front verandah.

Q. What was the condition of the bath tubs, Mr. Ditmar?

A. They were unserviceable. We could only use a shower bath, but the tubs could not be used. They had two holes of, I should say, one and a half inches diameter and the water could certainly run through them.

Q. Where did the water which ran into the holes go?

A. Well, one hole led to the pipe system and the other was on a level with the floor.

Q. Well, did they drain?

A. One led to the drain. It was for the water to run off. That was all right. And the second was on a level with the floor; the wall was pierced; there was a hole just on a level with the floor.

Q. I call your attention, Mr. Ditmar, to the items on page 3 of the plaintiffs' complaint. What is the first item?

A. Stone wall about the house.

Q. Did you order that stone wall to be built?

A. No, I did not.

Q. What is the second item?

A. 15 doors changed from 3rd group to superior group, with glass.

Q. Did you order that to be done?

A. No.

Q. Did you authorize it to be done?
A. No, I did not.
115 Q. What is the next item?
A. 19 louvered transoms.
Q. Did you order that to be done?
A. No.
Q. Did you authorize it to be done?
A. No.
Q. What is the next item?
A. Two bath tubs.
Q. Did you order the bath tubs?
A. I did not.
Q. Did you authorize anybody to?
A. I did not.
Q. What is the next item?
A. Galvanized iron wall, wood studding for spiral stairs.
Q. Did you order that?
A. No, I did not.
Q. Did you authorize that to be put in?
A. No, I did not, but I contracted for two staircases to be fixed up.
Q. You contracted for two staircases?
A. Yes.
Q. What is the next item?
A. Double doors below on river side.
Q. Did you otder those?
A. No.
Q. Did you authorize anybody else to order them?
A. No, I did not.
Q. What is the next item?
A. Drain pipes, 46.64.
Q. Did you otder those?
A. No.
Q. Did you authorize anybody else to order them?
A. No, I did not.
Q. What is the next item?
A. Two windows.
Q. Did you order those?
A. No.
Q. Did you authorize anybody else to order them?
A. No.
Q. What is the next item?
A. 1 bridge.
Q. Did you order the bridge?
A. I spoke to Mr. Campbell about it.
Q. Was that included in the contract price with the other things that you had?
A. No.
116 Q. That was not? Then, you ordered that?
A. Yes.
Q. What is the next item?

A. Extra depth of post foundations.
Q. Did you order that?
A. No, I did not.
Q. Did you authorize anybody else to contract for it?
A. No, sir.
Q. Is that all?
A. No, pillar under sala.
Q. Did you contract for that?
A. Yes.
Q. Mr. Ditmar, what were Mr. Duff and Mr. Cook employed for?
A. To survey the building.
Q. Were they employed to make contracts in that connection?
A. No, to check.
Q. The plans, specifications, and contracts were made, and Duff and Cook were to see that they were carried out?
A. Yes.
Q. With whom were the contracts made?
A. With Campbell & Go Toaco.
Q. On the part of Behn, Meyer & Co.?
A. As regards the filling up, I signed it myself; as regards the house, I drew it up and arranged for it, but the contract was actually signed by Mr. Cottoncamp.

Cross-examination by COUNSEL FOR PLAINTIFFS.

By Mr. CHICOTE:

Q. Since when have you been a partner of Behn, Meyer & Co.?
A. Where?
Q. Here in Manila?
A. First of January, 1902.
Q. Do you know when that land was bought?
A. I should say it was paid for in June, 1901, on or about; I think it was June.
Q. Where were you, then, at the time this land was purchased?
A. In Manila.
117 Q. Were you the man who bought this land?
A. Yes.
Q. In what capacity did you buy this land?
A. Well, I paid for it myself.
Q. Doesn't that land belong to Behn, Meyer & Co.?
A. Practically it belongs, but it stands in my name.
Q. Before purchasing this land, did you make an examination of it, did you go all through the land?
A. Yes.
Q. Did you go on horseback or on foot?
A. No, I walked.
Q. Did you go across the zacate fields?
A. In 1901, in the dry season, I did; 1900, I examined it; it was wet and I couldn't; I just walked around the embankments. I did not go across the zacate field, just examined it. I don't mean to say that I went all over the field.

Q. My question is whether or not you crossed the zacate fields?
A. From one part to the other?
Q. No, the place there where zacate was planted?
A. There were four places.
Q. Did you stand on the zacate land?
A. Yes, I did.
Q. What was the difference between this piece of land where the grass was planted and the other piece of land as to the level?
A. The embankment was, I should say one and a half to two feet, but I don't like to be certain of this point.
Q. Do you know the depth of the grass?
A. No, I could not say.
Q. When did you go to Europe the last time you went?
—. July, 1901.
Q. And when did you return to Manila?
A. Either the 31st of January, 1902, or the 1st or 2d of February.

Q. When you arrived here in Manila upon your return
118 from Europe, was that land filled up already?
A. No, partly.

Q. How could you state there was no flood at the time this land was filled when you only returned to Manila in January?
A. I just stated that the land had not yet been filled up, and the question put to me was that after the land had been filled up, whether there had been any inundation or not.
Q. When did you occupy the building?
A. Beginning of May, 1902.
Q. Who gave the possession of this building to you?
A. Nobody.
Q. Before you took possession of the premises, did you examine it?
A. Yes, I did.
Q. Where were you living before going into this building?
A. Calle Nozaleda.
Q. And after examining this new building you moved all your furniture into it, did you not?
A. No, I bought all new furniture.
Q. And you quit that house in Calle Nozaleda?
A. Yes.
Q. And what other repairs were done by you on the premises?
A. I had the floor cemented and the front verandah encased with shell windows.
Q. Do you know what was the paint of the ceiling?
A. The color?
Q. No, whether it was oil or paint?
A. I am not an expert in that; I can't say.
Q. Well, can't you see whether it is oil or ordinary paint?
A. Well, I should say that it is the same as about that (pointing to ceiling).
Q. The water that ran through the roof, did it leave any mark on the ceiling, any mark like this (pointing to the ceiling)?

119 A. No, sometime it didn't, and when it was dry it didn't, but as soon as we'd get rain we see it at once.

Q. And when there is no rain this mark disappears, is that what you mean?

A. Well, I must say I haven't paid great attention to it, and I really don't know whether such marks are to be seen or not.

Q. When did you observe these leaks?

A. I could refer here to the letters; I could find that out, but I don't know the date. Notice was given to the contractors, but I cannot remember the date.

Q. The verah*d*ah that you stated on which the water runs, do you mean the balcony around the building?

A. No, the verandah facing the Governor's palace and the verandah facing Migul Velasco's property.

Q. Is it not true that this verandah is entirely uncovered, that is, that there are no windows?

A. There are none, yes, but the roof is sloping down so that it should protect against the rain.

Q. Is it not true that, notwithstanding that fact, when the wind blew hard the water would come in?

A. Yes, but the doors should protect the dining-room from the water.

Q. Do you know who ordered the erection of these stone walls around the lot, this stone wall mentioned here in the complaint?

A. It was never ordered.

Q. And do you know if Mr. Cottoncamp ordered that to be done?

A. No, Mr. Cottoncamp told Mr. Campbell in my presence that he had no authority to build that part of the wall, and Mr. Campbell agreed that he had none, and said there would be no charge.

120 Q. At the time they were building this wall, you saw them working on the wall, did you not?

A. I did not; I should have stopped it.

Q. Is it not true when you noticed that this wall was being erected you told them to stop and that you would pay them for whatever had been completed?

A. Yes.

Q. Is it not true from the very beginning the doors of this house were built with lumber of the third group, and that subsequently you or some agents from Behn, Meyer & Co. ordered that these doors be taken away and that doors of superior lumber be built?

A. I do not think that that was the case.

Q. Is it a fact that the fifteen doors that the building has to-day are built of superior lumber*b* than that of lumber of the third group, and that these new doors have glasses?

—. They have glasses, yes; but whether the quality is superior or not, I do not know about the timber. There are good qualities of third group timber and bad quality.

Q. You stated once here that you ordered the contractors to make certain alterations. Will you please state what those alterations were?

A. Yes, I did, and I informed the contractors that they should state in black and white everything that was contracted for, and if anything was claimed afterwards that wasn't put down, it wouldn't

be paid for, and that was confirmed in writing by the contractors. It must have been on or about the end of February, the 22d or the 23d of February.

Q. Well, just name those alterations that you ordered, will you?

A. Well, the alterations, as far as I remember, are the staircase, two staircases; I contracted for the roofing paper, that is, rubberoid; then, when I came in, the house had no door, no entrance,
121 and, of course, I told the contractor that he had to make one, it was general for a house to have an entrance to it.

Q. Do you know whether or not Mr. Cottoncamp ordered some alterations during the course of construction?

A. Yes, I saw the contract he made with the contractors for the aleterations.

Q. Was it necessary for you to obtain the permission of Mr. Cottoncamp to order some alterations, or vice versa, or that either of you could act freely?

A. No, as soon as I arrived in Manila, I took charge.

Q. Why do you say that the bath tubs cannot be used?

A. They don't keep water.

Q. Why couldn't they keep water?

A. Well, there are two big holes; the water runs off partly into the drain and partly into the bath rim itself.

Q. Do you mean the holes for the purpose of water running down?

A. Yes, which is usually plugged. It should have a plug.

Q. Is it not true that there is a shower bath in the house when the contract does not call for the shower bath?

A. Yes, it was arranged expressly that the big tub should be made, and if it had not been there would have been no use contracting for a tub. There is a shower bath.

Q. Well, that is not called for in the contract, is it?

A. Not in writing.

Q. But you wanted a shower bath, did you not?

A. Oh, no, I wanted a shower bath and a tub.

Q. Why did you not specify in the contract that the bath room must be provided with a bath tub?

A. I thought itself understood that when you built a bath room that there must be a place where you can take a bath, not
122 only a shower bath; and besides it was arranged with Mr. Campbell and the dimensions were arranged that the tub should be made, and the tub was made, only it was badly made.

Q. But there was a tub there, wasn't there?

A. Well, you might call it so, but it was a tub that couldn't be used.

Q. The tub which you refer to, is it still there?

A. Yes.

Q. And do you make any use of it at all?

A. I tried it twice, but I had to give it up.

Q. Then these two holes in the bath room, or the tub, are the only defects in the bath room?

A. Yes.

Q. Do you think it to be a sufficient reason to state that on account of two plugs not having been provided to plug these holes to consider this bath room a bad job?

A. I notified the contractors several times to repair it, and if it was such an easy job to repair it they might have done it; I couldn't repair it, and I couldn't find anybody who could repair it.

Q. I now hand you this letter and ask you whether or not it was written by Behn, Meyer & Company?

A. Yes, it was written by myself.

Mr. CHICOTE: I will now offer this letter in evidence, having been identified by the witness.

The COURT: Do you consider all those papers read? And see they get into the file so I can examine them. None of them have been read to the court.

Mr. CHICOTE: This letter is as follows:

"MANILA, *6th September,* 1902.

Messrs. Campbell & Go Toaco, City.

GENTLEMEN: Referring to our letter of the 28th of April, we find that for the filling up of our property in Uli-Uli 62,-
123 690.50 cubic meters of sand were paid for to you.

As the total area is less than 20,000 square meters and the filling up ranges in depth from about one meter to one meter and three quarters, there is already an overcharge made by you.

Assuming 20,000 square meters to have been filled up 1.75 meters deep, and allowing a shrinkage of 20%, no more than 42,000 cubic meters of sand could have been used, and we now demand that the overcharge, viz., 20,690 cubic meters at $1.30 Mex. per cubic meter, $29,497.65, be refunded to us.

Yours truly, BEHN, MEYER & CO."

Mr. KINNEY: No objection.

(Received in evidence and marked "Plaintiff's Exhibit K.")

Mr. KINNEY: I rest, your Honor.

Defendant rests.

VICENTE W. PASTOR, called in rebuttal on behalf of the plaintiffs, being first duly sworn, testified as follows:

By Mr. CHICOTE: In an examination made by you of the property in Uli-Uli now in controversy, did you find the work done to it was imperfect?

A. No.

Mr. KINNEY: I object to that, if the court please. It is not rebuttal. He gave it as his opinion in the evidence in chief that the work was done well. You have his evidence there that it was done well.

Mr. CHICOTE: Why, I just want to rebut the evidence, your Honor, of the witnesses for the defense.

The COURT: Well, what the witness swore to in his examination in chief, it does not rebut anything for him to go back on the stand for him to swear to the same facts. Get down to the rebuttal questions.

Q. Did you notice any misjoint or defect in the rafters of this building?

124 A. To admit that the rafters are properly built, no.

Q. What defect did you find, then?

A. The defect I found was a shrinkage of the rafters, which is the usual case with lumber of that kind.

Q. With reference to the doors of the building, are there any defects so as to render them useless?

A. No, sir.

Q. Can you say that the foundations of this building are defective in any way?

A. No, sir.

Q. When the water enters the verandah of this building on account of the hard wind blowing into the building, would you call it a defect in the building?

A. No, sir, it would not be a defect. Of all these facts I have a memorandum made. This building by itself is separated from all other buildings; the two motions of the wind, north east and south east, which blow constantly in the Philippine Islands drive the water into the building. If you will permit me, I will give you an explanation by means of the photographs. The north east wind blows this way and the south east the other way in the opposite direction. The water driven by wind enters this verandah here, and the wind itself blowing hard would drive the water into the interior of the house, and that much also happens on this side of the house. If the water drops of itself without being driven by the wind, there is no means for the water to penetrate into this veranfah at all, because the verandah is protected by the eaves of the roof to the extent of one yard, and therefore, in order that the water may get on to this verandah, it must be forced by the wind; and if water is dropped in its usual or natural course, it cannot in any way penetrate on to this verandah. That is the explana-

125 tion how the water enters the building.

Q. With reference to the alterations mentioned in the complaint, do you believe that these alterations were made for the purpose of improving the building considerably?

A. Yes, sir, unquestionably.

Q. Do you believe that these items of work should be done without being observed by the engineer in charge of the construction work or by the owner himself?

The COURT: Ask the witness about what he knows. That doesn't furnish the court any information, about what a man believes. What information does that furnish to the court?

Mr. CHICOTE: I take an exception to the ruling of the court.

Q. Did you hear the opinions expressed by the two expert wit-

nesses introduced by the defendants as to the house and the filling of the land upon which the house is erected?

A. Yes, sir.

Q. Do you agree with the opinions submitted by them here in court?

A. No, sir.

Q. And can you state to the court in what respect you differ with their opinion in reference to the house and the filling of the land?

A. With reference to the filling, what I am about to say is not an opinion of my own; but there is the authority of some authors from whose books I work and make my living, the same books which were mentioned this morning and were shown to Major Case. Upon the authority of these authors, I beg to differ with the witnesses as to the amount of sand introduced into this filling. Take as a basis the area figured out by Behn, Meyer & Company, in other words, 20,000 square meters, as admitted by Behn,
126 Meyer & Company in one of their letters (Exhibit K) and considering the depth which they also admit (same exhibit), say 1 meter and 60 centimeters deep, the sand with which they filled that land in question was obtained from the river and was completely wet sand. Sand which is wet in its natural condition increases in volume from 10 to 20 per cent. The sand taken from a river and wet increases from 31 to 38 per cent. In this case, the land, as I understand, was filled up with wet sand. Well, I will take only 35% in order to make my calculation instead of the full percentage, in which case, as there is a depth of 1 meter and 60 centimeters to be filled, the sand ought to be deposited to the extent in height of two meters and 15 centimeters. The land upon which the filling was to be made formerly was flooded and wet soil. That soil we may consider technically as clayey, or approaching the nature of a clay soil. This piece of land was in a sticky and pasty condition. The difference of two meters and 15 centimeters to 3 meters in depth can very well be admitted that that part, on account of the rains and partly by the floods in the river during the time that the land was being filled, and also by reason of the natural weight of the sand when deposited on the land, these are the causes which account for the difference of 85 centimeters of sand. That is my opinion about the sand proposition.

Q. Now, in reference to the building?

A. With reference to the house, there are also several facts which must also be taken into consideration. In the first place, it must be taken into consideration the price contracted for the erection of the same——

127 Mr. KINNEY: I move to strike out the answer of the witness.

The COURT: Objection sustained.

Mr. CHICOTE: Exception.

Q. Go ahead with your opinion other than taking into consideration the agreed price.

A. Now, taking as a base the kind of materials from which this work was done, and comparing the plans with the specifications, I find that the work could not be done in any other way than that in which it was done. I find the building to be acceptable; that the specifications were complied with, except a few defects which are due to the condition of the materials themselves; but they are very small. Therefore I don't find any reason that this job could be rejected by any person who contracted for its construction. That is all I have to say with reference to the house.

Q. With reference to the bath rooms in this house, do you believe that they are not baths, and in case they are, that they cannot be used as stated by the witnesses for the defense?

A. In the first place, neither the specifications nor the plan state what kind of baths are to be built. Now, in my opinion, taking into consideration the plan and the specifications, I believe that the contractors ha-e done more than what they ought to—against their own interests.

Q. Can these baths be used as baths?

A. Yes, sir.

Cross-examination by COUNSEL FOR DEFENDANTS:

By Mr. KINNEY: Did you go into the attic of the house to examine the rafters?

A. No, sir.

Q. How, then, did you know the condition of the rafters?

A. First on account of the objections to the roof stated
128 by the people of Behn, Meyer & Company. Messrs. Behn, Meyer & Company and their people say that the water comes through the roof, and I can assure you and defy anybody to show me any spot or mark on the ceiling that the water has been running or leaked through the roof.

Mr. KINNEY: I move that that part of his answer with reference to what Behn, Meyer & Company said, and that he defied them to show any spot on the wall, be stricken out as not responsive to my question. I withdraw the question.

The COURT: Well, the question is withdrawn and the answer goes with it.

Mr. CHICOTE: The witness was asked whether he went up in the roof. He didn't say that he didn't examine that roof. Now he is asking the witness how did you examine it, and he wants to explain how he examined the roof.

The COURT: Tell Mr. Chicote that the question has been withdrawn and the answer goes with it.

Mr. CHICOTE: I don't know how a question can be withdrawn after the witness has already answered the question.

The COURT: If you are not satisfied with that, I will sustain the motion to strike out his answer as not responsive. It is not responsive.

Mr. CHICOTE: Did your Honor rule that the question should be withdrawn with the answer?

The COURT: It doesn't make any difference with me. I am not putting the question or the answer. Counsel said he withdrew the question. I had already sustained his motion to strike it out, and then he said, "I will withdraw the question." It's immaterial with me what is done with it. I don't want to consume any
129 more time with it. Strike the question out.

Mr. CHICOTE: Exception.

O. F. CAMPBELL, called in rebuttal on his own behalf, having already been duly sworn, testified as follows:

By Mr. CHICOTE:

Q. Did you see the land of Behn, Meyer & Company before it was filled?

A. Yes, sir.

Mr. KINNEY: I object to the question and answer. He testified on his examination in chief that he saw it.

The COURT: I will overrule your objection. Let him get it down and see what he has got to produce in rebuttal.

Q. Can you state what is the level of that land with reference to the street in front of it?

A. It was much lower than the street in front.

Q. Do you know how much below?

A. Over two feet. That was before the lot was filled or before the street was raised.

Q. From the level of this grass field did you measure down to the bottom as far as you could go?

A. I have seen carabaos up to their bellies in mud and natives up to their knees in the mud.

Q. In view of this, can you calculate more or less what was the depth at that time?

A. 50 centimeters, more or less.

Cross-examination by COUNSEL FOR DEFENDANTS.

By Mr. KINNEY:

Q. Didn't you make an estimate of how much sand it would take to raise that lot as high as Mr. Ditmar wanted it before you begun?

A. No, sir, we talked of it many times, and the estimates
130 were all made by Behn, Meyer & Company, and, though they tried to get me to make estimates, I never made any estimate of the sand.

Q. The contract reads, "The amount to be furnished will be over 15,000 cubic meters." Now, at that time, wasn't it estimated between you and Mr. Ditmar that it would take in the neighborhood of 15,000 cubic meters to raise that land?

A. Never on my part.

Both sides rest.

Defendants' Exhibits—being A., A2, B., C., and D.— already appear, being set forth in connection with the complaint and answer of said defendants.

Plaintiffs introduced, as their Exhibits K. and G. the following documents:

EXHIBIT K.

(1.) Letter of Behn, Meyer & Co. to Campbell & Go Toaco, dated September 6, 1902, and reading as follows:

Messrs. Campbell & Go Toaco, City.

GENTLEMEN: Referring to our letter of 28 April, we find that for the filling up of the property in Uli-Uli 62690.50 cubic meters of sand were paid for to you.

As the total area is less than 20,000 sq. meters, and the filling up ranges in depth from about 1 meter to 1 meter and three quarters, there is clearly an overcharge made by you.

Assuming 20,000 square meters to have been filled up 1.75 m. deep and allowing a shrinkage of 20%, no more than 42,000 cb. meters of sand could have been used, and we now demand that
131 the overcharge, viz. 20,690 cb. meter- @ 1.30 Mex. cur.— $29,497.65—be refunded to us.

Yours truly, BEHN, MEYER & CO.

(2.) Letter of G. W. Cooke to O. F. Campbell, dated April 29, 1902, and reading as follows:

"O. F. Campbell, Esq., 143 Lacoste, Santa Cruz.

DEAR SIR: Herewith enclosed a letter from Messrs. Behn, Meyer & Co. with reference to the filling up of the land at Uli-Uli with sand. I therefore ask you to comply with the same at once.

Yours truly, G. W. COOKE."

(3.) Letter from Messrs. Behn, Meyer & Co. to Campbell & Go Toaco, dated April 28, 1902, and reading as follows:

"Messrs. Campbell & Go Taoco, Manila.

GENTLEMEN: Your bills for filling up our Uli Uli property have been checked, and it has been found that about 60,000 cubic meters have been paid for.

As we did not get a satisfactory explanation from you, we have put the matter before our attorneys, and have been advised that you would be responsible unless you could give satisfactory proof that a quantity of about 60000 cubi- meter- was spread over the ground. As the total area is less than 20000 square meters, the average of filling up—including a fair allowance for shrinkage—must exceed at least two meters and a half.

We therefore ask you to show to our representative, Mr. G. W. Cooke, Plaza Moraga No. 7, which way the 60000 cubic meters were

disposed of, as we are in a position to prove that in a great many places the height of the sand does not reach one meter and sixty centimeters, you must be able to show places where at least double that quantity has been used.

If you cannot give those particulars within the next three days, that is, on or before the first May, 1902, our attorneys are instructed to take up the case at once.

Yours truly, BEHN, MEYER."

(4.) Letter from O. F. Campbell to G. W. Cooke, dated April 30, 1902, and reading as follows.

"Mr. G. W. Cooke, Engineer, 7 Plaza Moraga, Manila.

DEAR SIR: I beg to acknowledge your favor of the — inst., enclosing communication from Messrs. Behn, Meyer & Co. of the 28th, wherein they inquire as to the filling made by me
132 on their Uli Uli property and request proof that 60000 cubic meters of sand have been furnished.

The best proof I can give that the quantity of sand was supplied is their receipt for same and their weekly payments therefor as checked by their representative. I am certainly at a loss to understand the purport of the communication you enclose. My contract with Messrs. Behn, Meyer & Co. reads:

"Material will be measured in *whatever way* the said Campbell & Go Toaco—with the approval of Behn, Meyer & Co.—deem most expedient, then spread evenly over the ground to bring the lot to a certain level * * *"

The material was measured as taken from the bancas, a representative of Behn, Meyer & Co. being present and checking every meter as delivered. This system was pursued for almost a year, or until the entire completion of the contract. Messrs. Behn, Meyer & Co. were thoroughly familiar with it. Their manager was present in numerous instances and their representative at all times. The whole process met with their approval and received their sanction, as evidenced by their payments week after week for the number of meters checked out by their agent. No question was ever raised during the entire life of the contract as to the method of measurement pursued. The work was done, the quantity receipted for, and the payments made on the basis above outlined. That this is the usual and customary basis for measurement in such cases cannot be gainsaid. It is the basis on which I have paid the banca men for the sand delivered me. They have been paid—meter for meter—upon the measurement adopted by the representative of Behn, Meyer & Co. and myself. As a matter of fact, the agent of Behn, Meyer & Co. refused in many instances to accept the measurement as made by the banca men, and they were compelled to return and accept more sand. It was accepted then. The books and receipts in my office show that I have paid for 60000 cubic meters of filling. Every meter was delivered in the presence of and checked by a

representative of your company. In view of this, it is not apparent what more could have been done.

A method of measurement having been adopted and acted upon by both parties, and the contract having been completed upon that basis, it is not clear what bearing the area of the ground filled, and the possible depth of the filling in particular spots thereon at this time has upon the matter. As is well known, the ground was extremely rough and broken, being virtually rice paddies, ditched and uneven, some of it swampy. The utter impossibility of estimating the amount of filling upon such ground by superficial measurement, especially after it has shrunk and shifted through a year's settling and been beaten upon by sun and storms through an entire change of season, must be apparent any such method of measurement is patent, as it specifically states that the "material will be measured * * * and *then* (afterwards) spread evenly over the ground, etc." No method of superficial measurement was ever suggested, *were* payments ever made to me reserving on intimating such a basis. While I should regret having this matter brought into the courts, I am perfectly ready to do so if the
133 issue is forced. The contract has been fulfilled by me in every particular, and I am willing to stand upon it."

EXHIBIT G.

Seven Letters Introduced in Evidence by Plaintiffs.

(1) Letter from Messrs. Behn, Meyer & Co. to Campbell & Go Taoco, dated October 12, 1901, and reading as follows:

"Messrs. Campbell & Go Taoco, Contractors, Present, Re House Uli-Uli.

DEAR SIRS: Confirming receipt of your letter of 10th inst., we hereby accept your proposal, viz.:

To change the lower parts of the main posts, at present of soft wood, into posts of a first-class hardwood, at the rate of $432–. per 24 posts. The class of timber you will employ for the new posts must be approved of by Mr. W. A. Duff.

As we consider your quotation rather dear, but for obvious reasons do not care to get other bids for this work, we express the hope that you will be able to execute the work cheaper than quoted.

We are, Dear Sirs,
Yours truly,

pp. BEHN, MEYER & CO.,
F. KATTENKAMP."

(2) Letter from W. A. Duff to Mr. Campbell, dated November 4, 1901, and reading as follows:

"DEAR Mr. CAMPBELL: Please call at this office at your earliest convenience. Mr. Kattenkamp wishes some alterations made on plan of house at Uli-Uli, about which I would like to see you.

Yours truly, W. A. DUFF."

(3) Letter from Duff to Campbell, dated November 6, 1901, and reading as follows:

"DEAR MR. CAMPBELL: I did not get your *chit* until 10
134 o'clock on Tuesday morning, so could not of course meet you at eight.

I was there this morning, but did not see you. Please fix another morning, as I want to see you particularly, Mr. K. (Kattenkamp) having changed his ideas as to stair, any morning soon will be satisfactory."

(4) Letter from Mr. Duff to Mr. Campbell, dated November 8, 1901, and reading as follows:

"DEAR Mr. CAMPBELL: Mr. Kattenkamp and I will meet you on the ground at Uli-Uli at 8 a. m. to-morrow to settle doubtful points as to position of staircase, etc.

Yours truly, W. A. DUFF."

(5) Letter from Duff to Campbell, dated November 12, 1901, and reading as follows:

"DEAR Mr. CAMPBELL: I hunted up 143 Lacoste, but could get nothing out of the Chinese there; they said they had no spiral staircase there.

Mr. K. has now agreed about main staircase, and if you can look into this office to-morrow all will be ready for you.

Yours truly, W. A. DUFF."

(6) Letter of Behn, Meyer & Co., dated December 28, 1901 and reading as follows:

"O. F. Campbell, Esq., P. O. Box 389, City.

DEAR SIR: We beg to inform you that we accept your offer to make alterations to the house at Uli-Uli as specified in your statement dated November 23d and 17th resp. for the sum of $4000 (four thousand Dollars Mex.). With these alterations every question about construction of the house is settled. Please let us now know when you expect to have the building finished.

Stable and kitchen one building.

Please let us have the plan for this building.

Stone walls.

Although work on these has already begun, we have not made a definite contract. Please give us your offer in writing at your earliest convenience.

The work on the dwelling-house and attached building
135 must be pushed as much as possible, and we request you to do your best to finish it quickly.

We are, Dear Sir,

Yours truly,

pp. BEHN, MEYER & CO.,
F. KATTENKAMP."

(7) Letter from Messrs. Behn, Meyer & Co. to O. F. Campbell, dated January 13, 1902, and reading as follows:

"O. F. Campbell, Esq., Present.

DEAR SIR: We beg to confirm receipt of your letters of 2nd and 11th inst.

Stonewall.

We accept your offer to construct a foundation round our property at Uli-Uli for the sum of $10 per cubic meter wall, best Guadaloupe stone and first-class cement to be used for this work.

One wall is to encircle the whole property, and a smaller one to separate house and grounds from the rest of the property.

Wall above ground is not yet to be built. We will decide about this work later on.

Colour of paint for the outside and inside of the dwelling-house: We wish the outside kept in white and a dark green. All doors must be stained, not painted.

For bed-rooms please take colour No. 13, as per list enclosed (Orange-gray).

For drawing-room colour No. 22 (Blueish-gray); dining-room white.

We shall inform Mr. W. A. Duff accordingly.

We are, Dear Sir,

Yours truly,

Per Pro BEHN, MEYER & CO.,
F. KATTENKAMP."

136 On August 3, 1903, plaintiffs filed the following motion for a new trial, accompanying the same with the affidavits hereinafter set forth:

"Appear now the plaintiffs, and, supplementing their motion for a reopening of the case, state:

That by reason of the proceedings in the present case having been had solely in English, contrary to law, which provides that all such proceedings shall be in Spanish, unless the parties unanimously agree to the contrary, their attorney, through no fault of his own and due to his having been taken by surprise and confused owing to his being obliged to follow the case exclusively in English, neglected to introduce certain proof of vital importance to the rights of the plaintiffs, as appears from the affidavits of Campbell and Go Tauco themselves and of their attorney Alfredo Chicote."

Affidavit of O. F. Campbell.

UNITED STATES OF AMERICA, *Philippine Islands:*

In the Court of First Instance of the City of Manila.

O. F. CAMPBELL ET AL., Plaintiffs,
vs.
BEHN, MEYER & Co., Defendants.

PHILIPPINE ISLANDS, *City of Manila, ss:*

O. F. Campbell, having been duly sworn, appears and deposes that he is one of the plaintiffs in the above entitled matter.

That he knows positively, and, therefore, would testify, in the event that a new trial were granted, that the plaintiffs purchased all the sand used in the filling in of the defendants' premises from Filipino banqueros, these latter taking such sand from the
137 river, and plaintiffs paying them per cubic meter according to the measurements and accounts kept by the representative of the defendant company, who received and gave receipts for the sand delivered, for which sand the banqueros were paid at the end of every week according to the books of Messrs. Behn, Meyer & Co., with the approbation of the manager of the company defendant, and in accordance with the accounts kept by the representative of the defendants who received the sand as already stated; that the plaintiffs placed implicit confidence in the measurements made by the agent of Messrs. Behn, Meyer & Co. and in the books of the defendants, in accordance with the contract entered into with the banqueros, paying them, in accordance with the measurements and accounts, for the total amount of sand as shown by said books.

That Go-Tauco, the capitalist partner of the plaintiff firm, keeps, and for many years previous to this deal with the company defendant, kept a complete set of books covering his many business transactions, including those of the plaintiff company as contractor for the City of Manila. That the various entries and accounts relating to the filling in of the premises of the defendants appear in the blotter, day-book, expense book, journal, and ledger kept by the said Go-Tauco in the manner already set forth; that in said books are shown the cubic meters and the amounts paid for them by Messrs. Behn, Meyer & Co., as also the number of cubic meters and their cost paid weekly to the various banqueros from whom the sand was bought, and that the total number of cubic meters for which plaintiffs paid the banqueros is identical with the total number as shown by the books of Messrs. Behn, Meyer & Co. and the entries which appear in the books of Go-Tauco, with a difference of 172 meters, which is explained by the fact that receipts given by plaintiffs in accordance with the measurements of the representative of the defendants were subsequently falsified and mutilated before their presentation, for which reason payment was suspended as

regards the holders thereof and they were not entered in the books; that deponent has said receipts and will present them to the court; that although the books are kept in Chinese characters, deponent verified said sums and the number of meters paid for to the banqueros by means of a Chinese bookkeeper, who has stated to deponent the number of meters with the dates of the payments, which are the following: Weekly payments on account of sand delivered to Messrs. Behn, Meyer & Co.

1901, July	14	174.50	cubic meters
	21	1149.75	
	28	1231.50	
Aug.	18	1078	
"	25	1188.25	
Sep.	1	1359.50	
	8	1816.25	
	15	1119.50	
		125	
	22	896.75	
	29	57	
Oct.	6	1425	
	13	1868	
	20	1491.75	
	27	971.50	

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1901, Nov.	3	2453.50	
	10	1030.75	
	17	2475.75	
	24	2836	
Dec.	1	2356.75	
	8	1733.75	
	15	835.50	
	22	604.50	
	29	916.25	
1902, Jan.	5	868.75	
	12	2327	
	19	2211.50	
	26	2562.75	
Feb.	2	2316.75	
	9	2489	
	23	3311.50	
Mar.	2	3418	
	16	3339.75	
	23	3063.50	
	30	691	
Apr.	6	589.25	
	13	473.25	
Total		64272	Cubic Meters.

The three last entries of March 30th and April 6th and 13th, respectively, are those which, according to the evidence introduced in the case, have not been paid by the plaintiffs.

That the deponent is desirous, with the permission of the court, to introduce said books in order that the court may examine them through an interpreter in the person of any Chinese whom the court may designate or the defendants suggest.

That plaintiffs have not now, nor have they ever had, any means of ascertaining the exact quantity of sand delivered other than the measurements and accounts made and kept by the said representative of Messers. Behn, Meyer & Co.; that the agent whom plaintiffs had upon the land when the sand in question was being measured and delivered kept only a duplicate account of the measurements as they were taken by the agent of Messrs. Behn, Meyer & Co. and given to him, for the purpose of taking notes and verifying the accounts of the defendant company at the end of the week when Behn, Meyer & Co. settled accounts with plaintiffs and the latter in their turn settled with the banqueros; that plaintiffs collected from defendants and paid out the sum as stated to them by the representative of the firm, believing in good faith that the account was correct, deponent still believing that the total amount collected for was really and as a matter of fact delivered.

Deponent has been informed by his attorneys that this proof is vital, and constitutes a complete and valid defense against the counter-claims of the defendants in so far as the sand contract is concerned; that deponent, although he was well aware of all these facts and was prepared to testify in regard to them, did not have an opportunity so to do, inasmuch as he was not questioned on this subject by his attorney; and that he has been informed, and believes that said evidence escaped the notice of plaintiffs' at-
139 torney, D. Alfredo Chicote, to whom deponent related all the facts of the case, including what has just been stated, and to whom the co-plaintiff entrusted the conduct of the said case; that deponent has been informed and believes that Mr. Chicote is one of the most able, learned, and competent attorneys practicing on the Philippine Islands, wherefore it was logical that he should trust absolutely in the latter's judgment; that the said attorney, D. Alfredo Chicote, neither speaks nor understands the English language; that the proceedings in the matter in question were had in English, though the evidence given in English by the witnesses was translated very distinctly to the attorney; that the proceedings were taken down in English by an American shorthand reporter, and, upon being read to the court or to the attorney, were interpreted indistinctly, and deponent was frequently under the necessity of correcting the interpreter and translating to his attorney, all of which gave rise to confusion, and by reason thereof deponent understands and believes that the attention of his attorney was distracted so that he was unable to present properly the points in controversy and his proofs in support thereof, and deponent understands and believes that his said attorney, by reason of these inconveneinces and anomalies, was completely confused and bewildered.

That the omission of this evidence was a surprise upon plaintiffs which they could not evade by ordinary prudence and by reason of which their rights have been seriously prejudiced.

(Signed) O. C. CAMPBELL.

Subscribed and sworn to before me this 3d day of August, 1903.

(Signed) LORENZO A. BARRETTO,
[SEAL.] *Notary Public.*

My commission expires January 1, 1905.

Affidavit of Go-Tauco.

UNITED STATES OF AMERICA, *Philippine Islands:*

In the Court of First Instance of the City of Manila.

O. F. CAMPBELL ET AL., Plaintiffs,
vs.
BEHN, MEYER & Co., Defendants.

PHILIPPINE ISLANDS, *City of Manila, ss:*

Go-Tauco, having been duly sworn, deposes: That he is the capitalist partner of the plaintiff firm; that he has read the foregoing affidavit of Mr. O. F. Campbell; That he knows of his own knowledge all of the facts stated therein with reference to deponent's books; That he has compared the account of the sand paid for by him to the banqueros, as the same appears set forth in the affidavit of Mr. Campbell, with the entries of said payments which appear in his books, and that said account -s a true and correct extract
140 from the books which he keeps in his business, which books deponent is ready to submit to the court for examination; That the banqueros who delivered the sand with which the premises were filled in were not employees of plaintiffs or of either one of them, but were public banqueros whom plaintiffs paid for the sand per cubic meter according to the measurements and accounts made and kept by the company defendant. The deponent further declares that he does not understand English and but very little Spanish, and that during the trial of the above entitle*f* cause he neither understood nor could understand what was being said other than what his co-plaintiff communicated to him; That the deponent placed implicit confidence in his attorney, Alfredo Chicote, in his presentation of the defense. That he related all the facts referring to the said business to his attorney, and believed that all the essential facts had been proved until the case was finished and judgment rendered; That it was then only that for the first time he learned of the omission of the evidence of payment having been made to the banqueros in accordance with the measurements made by the defendants, and noted its essential importance as a refutation of the counter-claims of the defendants.

(Signed) R. MACHUCA GO-TAUCO.

Signed and sworn to before me this 3d day of August, 1903.

(Signed) LORENZO A. BARRETTO,
[SEAL.] *Notary Public.*

My commission expires January 1, 1905.

Affidavit of Alfredo Chicote.

UNITED STATES OF AMERICA, *Philippine Islands:*

In the Court of First Instance of the City of Manila.

O. F. CAMPBELL ET AL., Plaintiffs,
vs.
BEHN, MEYER & Co., Defendants.

PHILIPPINE ISLANDS, *City of Manila, ss:*

Before me the undersigned personally appeared, this day, D. Alfredo Chicote, who states under oath: That he was the attorney of Messrs. Campbell & Go-Tauco in the case No. 1181—Campbell & Go-Tauco *vs.* Behn, Meyer & Co.,—which case was heard in Department 2 of the Court of First Instance of the City of Manila, and that the affidavits made by Messrs. Campbell and Go-Tauco in support of their motion for a new trial have been translated to him, and that the facts therein stated, in so far as they regard this deponent, are substantially true.

That he introduced in evidence the letter from Mr. Campbell to Mr. Cook under date of April 30, 1902, in which appear in substance the facts set forth by Mr. Campbell in his affidavit in regard to the measuring of the sand, and that it was his intention to present, and that he would have presented, in evidence the substance of said affidavit, as well as the books of said Go-Tauco, but that, 141 by reason of the fact that the proceedings were had in a language unknown to him and were very imperfectly translated to him, he became very much perturbed and bewildered, and the presentation of said evidence escaped his mind.

That said proceedings have not yet been translated into Spanish, for which reason he has not a perfect knowledge of what did actually transpire during the trial. That he believes that he could not understand the judge and that the judge did not understand him.

(Signed) ALFREDO CHICOTE.

Subscribed and sworn to before me this 23d day of August, 1903.

(Signed) LORENZO A. BARRETTO,
[SEAL.] *Notary Public.*

My commission expires January 5, 19[illegible].

The court, on August 4, 1903, denied the petition for a new trial, to which ruling plaintiffs at once excepted, at the same time giving

notice of their intention to perfect a bill of exceptions for the purpose of having the Supreme Court pass upon the question.

The foregoing bill of exceptions having been presented for its approbation on the 7th of August, 1903, by the plaintiffs in the above entitled matter, and defendants having been duly notified and an opportunity afforded them to be heard in regard to the correctness of said bill of exceptions, and the undersigned Judge having examined the same and being of opinion that the facts as stated are correct, said bill of exceptions is hereby approved and ordered filed with the record in this matter.

(Signed) JOHN C. SWEENEY, *Judge.*

I certify that the foregoing bill of exceptions is a true copy of its original hereto annexed in the above entitled matter, and that same has been approved by the Hon. John C. Sweeney, Judge of the Court of First Instance of Manila, Department 2.

Manila, September 2, 1903.

(Signed) J. McMICKING,
Clerk of Court of First Instance.

142 Received the foregoing bill of exceptions this 9th day of September, 1903, at 3:10 P. M.

(Signed) J. BLANCO,
Deputy Clerk of the Supreme Court of the Philippine Islands, Ex-officio Notary Public.

On April 2, 1904, the Supreme Court of the Philippine Islands entered the following judgment:

Supreme Court, Philippine Islands.

O. F. CAMPBELL & Go-TAUCO, Plaintiffs and Appellants,
vs.
BEHN, MEYER & COMPANY, Defendants and Appellees.

McDONOUGH, *J.:*

On June 20, 1901, the appellants entered into a contract with the appellees, under which the former were to build for the latter a dwelling on a certain lot in the city of Manila, according to a plan and specifications made for this purpose, for the sum of Thirteen Thousand Mexican Pesos ($13,000), payment to be made in three instalments: $4,000 when the necessary material was on the land, and the work was commenced; $4,000 pesos when the house was finished as to walls, roof, etc.; and $5,000 pesos on the completion of the work, which was to be finished within three months.

143 In addition, $500 pesos were to be paid for the instal-ation of the city water in stables, kitchens, baths, and water-closets, and the necessary drain pipes; and, for the construction of a stable in accordance with the specifications indicated, one thousand five

hundred Mexican pesos, payable at the termination of the work, making a sum total of 15,000 Mexican pesos.

On the 20th day of June, 1901, plaintiffs contracted with defendants to fill a certain lot on the bank of the Pasig River with earth and sand, at the rate of $1.30 Mexican currency per cubic meter, a copy of which contract is as follows:

"MANILA, P. I., *June* 20, 1901.

We, Campbell & Go-Tauco hereby agree to and with Behn, Meyer & Company, City of Manila, upon their signed acceptance, to fill up a certain lot lying on the bank of the Pasig River, next to Malacañan Palace, with a suitable filling composed of earth and sand of good quality, at the rate of one dollar and thirty cents ($1.30), Mexican currency, per cubic meter. Material will be measured in whatever way the said Campbell & Go-Tauco, with the approval of Behn, Meyer & Co., deem most expedient, then spread evenly over the ground to bring the lot to a certain lev l, which level will be determined by Behn, Meyer & Co. Weekly, to account, payments to be made to Campbell & Go-Tauco by Behn, Meyer & Company. The amount to be furnished will be over fifteen thousand (15,000) cubic meters, and delivered at the rate of five thousand cubic meters monthly, unless some unforeseen cause, as storms, etc., make it impossible.

Accepted.

(S'g'd) BEHN, MEYER & CO.,
GO-TAUCO,
O. F. CAMPBELL,
Contractors."

The contract and specifications for the building of the house are quite brief; and they, as well as the plans, show a lack of such details as to work and materials as are usually incorporated in contracts, plans, and specifications, for expensice buildings.

The specifications are as follows:

"*Specifications to Govern the Construction of a House of Strong Materials on the Lot on Malacañan Street, District of San Miguel; Owners, Behn, Meyer & Company.*

1st. The house shall be twenty-four yards in width, twenty yards deep, and seven and one-half yards high.

144 8nd. The foundations shall be of ordinary Guadalupe stone and shall have a depth of 1 meter by 1 meter with 1 meter by .60 m. The stone work of the lower story shall be of the kind known as ordinary Guadalupe stone of .16 of a meter.

3rd. The uprights shall be constructed of Apiton, Macasin, or Amoguis wood .20 m. by .20 m. square. The frame work of the roof, the stringers, trusses, crossbeams, hangers, stays, and partitions shall be of Apiton, Macasin, or Amoguis wood; the stays shall be .12 m. by .07 m. square.

4th. The partitions of the upper floors shall be of boards made of

the woods above indicated, one-half inch in thickness; the flooring of the upper story shall be of Amoguis or Tangli.

5th. The windows shall be of native shell. The doors of the rooms on the upper story and of the apartments on the lower story shall be of Macasin or Apiton, and the railing of the porch shall be of timber of the same class.

6th. The principal stairway shall be 1 m. and .40 m. wide, with a hand rail and railings .05 x .05 m., and another stairway for the servants .05 m. wide, constructed of timber of the second class.

7th. The paint used on the exterior of the building shall be oil paint and on the interior water paint, with the exception of the doors, which are to be varnished."

The parties to the building contract agreed to have certain alterations and additions made to the house, and these were made during the progress of the work. The amount charged by the plaintiffs for the materials and labor for these alterations, and the extra work, was 7,750 pesos, making the total cost of the structures and appurtenances the sum of 22,750.62 pesos, of which sum the defendants paid to the plaintiffs the sum of 13,500 pesos, leaving an unpaid balance claimed by the plaintiffs of $9250.62 Mexican currency, for which sum the plaintiffs brought this action.

The defendants, in their answer, disputed their liability to pay a sum of $2,333.12 claimed by plaintiffs for alterations, extra work, and labor, but at the trial they practically admitted that if they failed in their defense, that the plaintiffs constructed said house in an unworkmanlike, careless, and negligent manner, the plaintiffs would be entitled to judgment for the full amount claimed by
145 them for their work and materials, viz., $9,250.62 pesos.

In his decision of the case, the learned judge of the Court of First Instance must have found that this extra sum claimed by plaintiffs was proved, for he stated:

"I have concluded that an equitable adjustment of this matter is to deny the plaintiffs any other compensation than they have already received, because of their breach of contract in so defectively constructing the improvements of the defendants, and that the defendants are entitled to at least the *unpaid balance*, as damages sustained by them on account of the manner in which these improvements were constructed by the plaintiffs."

The unpaid balance claimed by plaintiffs was $9,250.62 Mexican currency. As the defendants neither objected nor took exception to this finding of the Court, it must stand as the amount which the Court held was offset by the failure of the plaintiffs to comply with the building agreement.

The defendants not only claimed damages for this breach of the building contract, for the reason, as they alleged, that the work was not performed according to the contract, plans, and specifications; but, by way of counterclaim, they also allege that plaintiffs represented to the defendants that the amount of sand and earth used in the filling of the lot was 62,690.50 cubic meters, and that the defendants paid to the plaintiffs therefore $81,497.65 Mexican currency;

that the amount of sand and earth actually deposited on this land was 31,000 cubic meters; and that they had paid the plaintiffs for 31,690.50 cubic meters of sand or dirt which was not used to fill the lot in question, amounting to the sum of $41,197.65 Mexican currency, and prayed judgment for the sum of $71,197.65 Mexican currency, to wit, $30,000 on their first counterclaim for the failure of plaintiffs to comply with the building agreement, and
146 $41,197.65 on the second counterclaim, with costs.

In their reply, the plaintiffs allege that they had delivered on said lot, for defendants, 64,444 cubic meters of earth and sand, for which they are entitled to $83,777.20 Mexican currency, and that there is due them thereon $2,279.55.

In the decision of the court below, it is said by the judge:

"I am further satisfied that the defendants paid plaintiffs $1.30 per cubic meter for at least 40,000 cubic meters of sand and dirt as filling for their lot which was not put thereon by plaintiffs, which amounts in the aggregate to $52,000 Mexican currency."

And judgment was ordered, "That the plaintiffs' complaint be dismissed, and that the defendants recover of the plaintiffs the said sum of $52,000 Mexican —, and costs of this case."

Plaintiffs duly excepted, and made a motion for a new trial.

The house was finished early in May, 1902, and the defendants accepted it by moving into it at that time. A careful reading of the evidence in this case, and an examination of the plans and specifications, lead to the conclusion that there are defects in the building in question. Among these are the following: The foundations are not such as a first-class architect would recommend for a large building, to be erected on soft and spongy ground; the pillars are not placed on these foundations in such a way as to give the best support; the wood is of an inferior kind or group. The house has settled; the floor boards and others have sunk, and the floor of the verandah slopes towards the house on all sides. In order, however, to hold the plaintiffs liable for these defects of plans, specifications, and of construction,
147 it must be shown that they were caused by the plaintiffs and because of their defective workmanship.

During the progress of the work, the defendants had two engineers on the premises—Mr. Duff, who died, and Mr. Cook, who succeeded him, whose duty it was to see to it that the work was done in a workmanlike manner and according to the plans and specifications.

There is no evidence to show that the instructions of the engineer who directed the work were at any time disregarded by the plaintiffs, nor is there anything in the case showing that the engineer complained of defective work. Moreover, it is practically conceded by all the witnesses examined on this question, that the wood and timber provided for in the contract was of an inferior group or grade such as warps and shrinks.

The most serious defect in the house was caused by the settling of the pillars for lack of proper foundations.

The proof, however, shows that the foundations were built according to the plans and specifications, and that the pillars were placed as the plans required them to be placed. The plaintiffs are not to

be held in damages for following these plans, especially when they were followed under the eyes of the defendants' engineer and without objection from him.

In fact, it was affirmatively shown in the case that Mr. Duff gave orders regarding the changes of posts and made the modifications he deemed necessary in regard to the foundations and posts; and Mr. Dittmar, the manager of the defendants, testified that Mr. Duff, as surveyor, "Had power to see that the building was properly carried out."

148 The principal expert witness for the defendants testified that there was a defect of construction, in that not all of the piers are under the posts or pillars; that the pillars ought to rest on top of the foundation; but, when shown the plan of the building, which was approved by the municipal authorities, he admitted that, according to these plans, the pillars were to rest, not on top of the foundations, but to pass through the foundations and to rest on the ground; and that when the builders placed a course of stone under the pillars in the middle of the foundation, they improved on the plan and made the foundations of the pillars stronger; nor did this witness say that the joints of the pillars were insufficient. He said they could be improved by using straps as well as bolts. There is nothing, however, in the plans or specifications requiring straps.

Other defects mentioned by this witness are undoubtedly due to the grade of lumber used, the same kind provided for in the contract and specifications. The specifications, said this witness, provide for timber of the third group. This grade of timber is, lighter and more spongy than the groups higher than the third. On account of being spongy, it shrinks during the heat. It cannot be tightly adjusted so as not to leave a space. It would be difficult to make a good joint with this wood, which would remain joined; it could be tight, but it might shrink and open and close again.

Surely the plaintiffs cannot be held responsible for the defects of the timber which they furnished, as provided for in their agreement, and which was of the group and quality designated by the defendants.

149 From the evidence in this case, it must be found as conclusions of fact:

1. That in the construction of the building the contract, plans, and specifications have been complied with, with the exception of a variation to the advantage of the owner, which is that the principal posts rests upon layers of stone, instead of upon the ground as called for by the plan.

2. That if there has been any variation from the original plan, this was done largely, if not wholly, with the consent of the owner, and, at all events, with that of his agent, the inspecting engineer, and that these changes have been improvements.

3. That the house was constructed under a contract and specifications which did little more than to designate the size of the building, the material to be employed, and, with the plan, gave a drawing of

the building, leaving the details necessarily almost completely to the direction of the inspecting architect or engineer.

4. That the owner entrusted the direction of the work to an inspecting engineer selected by himself, with full authority to represent him, and that the contractor has performed the work solely in accordance with the direction of the said inspecting engineer.

5. That although there is some evidence to indicate that a part of the house has settled more than other parts, this is due either to the ground itself or to a defect in plan, or to the directions of the inspecting engineer, and cannot be attributed to a failure on the part of the contractor to comply with the conditions of the contract.

6. If there are any cracks in the floor and in the joints in
150 the building, this is due to the class of lumber which was selected by the owner.

7. That the plan of the work and the placing of the principal posts were approved by the city engineer and were in conformity with the ordinances.

8. That the owner took possession of the house in the month of May, 1902, and has occupied it since that time as a dwelling-house.

By the very fact of accepting the house and occupying it, the defendants acknowledged that it was constructed substantially as required by the contract, plans, and specifications; and this is the law even when the work is not done according to the contract, but accepted.

In case of a contract for furnishing materials and building a house in a specific manner, if it be not done according to the contract, the party for whom it is built may refuse to receive it and elect to take no benefit from what has been performed. If he does receive it, he shall be bound to pay the value—the reasonable worth of what he receives.

6 New Hampshire 481, 8.

Where the owner moves into the building contracted for, the rule of substantial performance should be applied in an action by the contractor.

Duell *vs.* McCraw, 86 Hun. (N. Y.) 331.

This being the law, the court below erred in adopting as a measure of damages what it would cost to take this building down and to rebuild it, estimating the cost of the materials and of necessary new materials, and without proof of the actual costs of either.

151 This is not the rule of measure of damages adopted by the Courts.

Kidd *vs.* McCormick, 83 N. Y. 391.

Corland *vs.* New Orleans, 13 La. Ann. 43.

Cullen *vs.* Sears, 112 Mass. 299.

It follows that inasmuch as the plaintiffs complied with their contract and constructed the house according to the plans and specifications and under the directions of the defendants or their author-

ized agents, they are entitled to recover therefor the unpaid balance as found by the court below, viz., $9,250.62 Mexican currency.

The claim for recovery of the money paid by the defendants to the plaintiffs for 31,690.50 cubic meters of sand and earth which, it is alleged, were paid for but were not placed on the defendants' lot is next to be considered.

The contract is undisputed, but the defendants claim that the total amount of earth and sand paid for was not delivered, and that the money was paid therefor under a mutual mistake of facts. The plaintiffs are not charged with receiving this money by fraud or deceit, or with any fraud or deceit in the measurement or delivery of the sand and earth.

The defendants paid for 62,690.50 cubic meters, and the plaintiffs claim that they delivered to the defendants 64,444 cubic meters, and ask, in their reply to the defendants' answer, for payment of 1,753.50, not heretofore paid for, amounting to $2,279.55 Mexican currency.

The burden of the proof is on the defendants to show that they did not receive the 62,690.50 cubic meters of sand and earth, and
152 on the plaintiffs to show that they delivered 1,753.50 cubic meters of sand and earth for which they were not paid.

Pursuant to their contract, the plaintiffs began to deliver the sand and fill the lot on or about July 14, 1901, and continued to deliver the same until April, 1902.

The sand was measured in bancas by the agent or servant selected and paid by the defendants. Receipts for this sand were given daily to plaintiffs, and at the end of each week duplicate bills were rendered by them to the defendants, which were O. K.'d by the manager of the defendants' firm and then paid.

The authorized representative of the defendants who gave the receipts was on the ground constantly to receive this sand—in fact, he lived on the ground. The sand was taken from the river and was wet when delivered.

The defendants kept a book account of all sand delivered. The plaintiffs kept a man there to see to it that all the filling went on and to take the receipts from defendants' representative. One of the representatives of the defendants who measured the sand was called by the plaintiffs as a witness, and testified that he measured the water-line of the bancas containing the sand. That the number of cubic meters of sand were told by certain marks on both sides of each banca, and that he was instructed by the manager of the defendants that it was not necessary to measure the bancas. The defendants, by their own books and receipts, and as measured by their own agents or servants, showed that they received and paid for 62,690.50 meters of sand and earth.

In order to disprove their own admissions and books,
153 they called two expert witnesses to show that this amount of sand and earth was not on the lot in question at the time of the measurement of these witnesses—presumably after September 6, 1902, for in the letter of the defendants to the plaintiffs

of that date the former do not appear to have had the figures subsequently given by these witnesses—and many months after the sand and earth was all delivered.

The defendants did not call as witnesses any of their own agents or servants who measured this sand at the time of delivery, nor any of the banca owners or managers to show the amount delivered.

The lot which was dilled contained, according to defendants' witnesses, a superficial area of 16,573.50 sq. meters.

It was, before it was filled, a rough piece of land, covered with very deep ditches, in, part a paddy field and in part a swamp where people fished and watered their carabaos. The defendants' experts made a survey of this lot, and an examination of the sand thereon, many months after it was deposited, with a view of determining the amount of sand originally deposited there by the plaintiffs. They measured the area of the lot, and sunk five or six holes down to what they called the original soil, took the depth of the sand as shown by those holes, made a general average, allowing 15% for settlement, and reached the conclusion that there had been placed thereon a quantity of sand amounting *approximately* to 20,965 cubic meters. These holes, it was said, were distributed at intervals over the property so as to enable the witnesses to get an average "guess" at, or approximation of, the amount delivered.

One of these experts stated that he did not see this zacate
154 field before it was filled up, and that he did not know how many little ridges there were or how many canals may have existed on the property.

We cannot assume, in the absence of proof, that these witnesses sunk holes in that part of this large lot where the deep ditches or canals existed or where the swamp was. The correctness of the conclusion reached by these experts depended, to a great extent, on the depth of the holes sunk through the sand, and this depth depended on whether or not they were sunk on the level part of the lot or in the ditches or swamp.

The evidence, therefore, is uncertain and does not enable us to accurately determine the exact number of cubic feet of sand or earth delivered on the lot; and this is especially true when the evidence shows that the conclusions of the defendants' experts are disputed by two experts called by the plaintiff, experts of larger experience than those of the defendants and equally as competent to give opinions on this question.

These experts called by the plaintiff testified that the amount of sand and earth mentioned as delivered and paid for could have been delivered on this lot and yet show no greater bulk than that which appeared there when the defendants' experts made their measurements, provided a greater percentage were allowed for settlement, and they cited the works of eminent engineers to show that the allowance for settlement should be from 31 to 38 per cent. instead of 15 per cent.

In view of the fact that this filling was measured at so long

a time after it was placed on the lot; in view of the fact
155 that the estimates of these witnesses of the amount delivered is but an approximation or "guess;" in view of the conflict of testimony regarding such amount; and in view of the fact that the defendants, by their authorized representatives, actually measured the sand and earth at the time of the delivery of each banca load, in the manner directed by the manager of the defendant, we cannot now say that this latter measurement is all wrong and the new measurement all right, especially when there is no proof that any fraud or deceit was practiced on the defendants in the matter of measurements or in the keeping of the accounts thereof.

The learned judge who tried this case seems to have been of the opinion that because the contract states that the amount of sand to be delivered shall be *"over* 15,000 cu. meters," therefore it was a conclusive corroboration of his finding that not more than 21,000 cubic meters of sand was placed on the lot.

If only about 15,000 cubic meters were intended, why did not the defendants stop the delivery when they knew that 15,000 cubic meters had been delivered? After the amount had gone beyond that mark, why were not the defendants put upon inquiry? Why, if they suspected anything wrong in the measurement, did they not make an investigation?

Delivery of filling began early in July, 1901, and down to October 20th of that year the amount delivered exceeded 16,000 cubic meters according to the defendants' own record. Why, then, if only about 15,000 cubic meters, or even 21,000 cubic meters, were sufficient to fill the lot, did the defendants let the filling go on during the remainder of October, the whole of November and December, 1901, and January and February and down to
156 the latter part of March, 1902? and this without a word of complaint from the defendants during its progress, and not a word afterwards until plaintiffs began to press defendants for their unpaid balance on the house contract.

It is not unusual to allow a plaintiff to recover money paid to a defendant through a *mutual* mistake of fact. That was the case of Whedon *v.* Olds, 20 Wendell (N.Y.), 174 cited by the defendants' counsel. That the parties guessed at the quantity of oats in a storehouse, and payment was made on the basis of this guess. Afterwards the oats was actually and accurately measured, and the plaintiff recovered the excess of payment, on the principle that there had been a mutual mistake in the amount guessed. There could be and was no doubt in that case as to the amount actually delivered, because it was measured. In the case at bar, this process has evidently been reversed by the court below. The parties first actually measured the sand and earth, and the amount was paid for according to actual measurement; but now the defendants, by their experts, have guessed that they did not receive as much as the defendants' former measurement shows, and they want a return of money on the ground that the guess is more reliable than the measurement. The plaintiffs deny that there was any mistake,

mutual or otherwise, in this former measurement; and so this Whedon case does not sustain the contention of the defendants. Nor does the case of Whitcomb *v.* Williams, 4 Pick. (Mass.), 228, sustain the contention of the defendants. In that case, one of the parties, for years, had been buying rum of the other party, and had been paying for the same on the belief that the cask in which
157 it was measured contained 121 gallons, whereas it turned out, after payments had been made, that the cask contained only 114 gallons. Here was a mutual mistake, a mistake which could not be denied. Here was actual measurement of the amount of rum delivered, and, of course the plaintiff was entitled to recover the excess of his payments. But the case at bar is entirely different. No fraud or deceit is proved, and no mutual mistake is shown by unmistakable evidence.

This case, in the absence of evidence of a mutual mistake, is governed by the doctrine of estoppel. The defendants measured the sand, they receipted for it, and they paid for it. They cannot now say that they did not receive it. It comes within the principles laid down in Austin *v.* Wauful, 36 S. R. (N. Y.) 779, where it was held that a receipt given by the plaintiff in that case for the property in question estopped him from denying that he had the property when the action was brought.

In Behring *v.* Somerville (44 At. Rep. 641), it was held that the fact that both parties had equal means of information, and money was paid upon a mistake of fact, cannot, in the absence of fraud, be recovered back, the money being that of the payee.

It follows that the defendants are not entitled to recover from the plaintiffs the said sum of $52,000 Mexican currency allowed by the court below.

As we do not find that the plaintiffs have satisfactorily proved the delivery of the additional sand and earth for which they claim $2,279.50 Mexican currency, that claim is disallowed.

The judgment of the Court of First Instance is reversed,
158 and judgment ordered for the plaintiffs for the sum of $9,250.62 Mexican currency, with costs of both instances.

COOPER, *J.*, concurring:

I conform to the reversal of the judgment, but the case should be remanded to the Court of First Instance for a new trial.

To the foregoing judgment of the Supreme Court, the defendants filed the following exception and petition to appeal from same to the Supreme Court of the United States:

UNITED STATES OF AMERICA, *Philippine Islands:*

In the Supreme Court.

CAMPBELL & GO-TAUCO, Plaintiffs and Appellants,
vs.
BEHN, MEYER & COMPANY, Defendants and Appellees.

The defendants and appellees herein, by their attorneys, Pillsbury & Sutro, respectfully appear and except to the decision of the Honorable Supreme Court of the Philippine Islands reversing the decision of the Court of First Instance, and petition the Court for leave to appeal from said decision to the Supreme Court of the United States of America, the amount involved being more than the sum of $25,000, U. S. currency, and further request that the Clerk of the Supreme Court of the Philippine Islands be directed to have translated into English the record, testimony, stipulations, and all other proceedings herein and certify the same to the Supreme Court of the United States of America.

BEHN, MEYER & COMPANY,
Defendants and Appellees,
(Signed) By PILLSBURY & SUTRO, *Attorneys.*

159 On April 30, 1904, the following order was issued by the Supreme Court of the Philippine Islands:

UNITED STATES OF AMERICA, *Philippine Islands:*

In the Supreme Court of the Philippines.

CAMPBELL & GO-TAUCO, Plaintiffs and Appellants,
vs.
BEHN, MEYER & COMPANY, Defendants and Appellees.

On motion of counsel for defendants and appellees, it is ordered that an appeal to the Supreme Court of the United States of America from the final decree and judgment heretofore filed and entered herein be, and, it appearing to the Court from the record that the amount involved is more than $25,000, U. S. currency, the same hereby is, allowed; and that the record, testimony, stipulations, and all proceedings herein be translated into the English language, and that a certified copy thereof be forthwith transmitted to said Supreme Court of the United States of America.

It is further ordered that a bond on appeal be fixed at the sum of Six thousand ($6,000), U. S. currency, for costs and damages on appeal.

Manila, P. I., April 30, 1904.

(Signed) E. FINLEY JOHNSON,
One of the Associate Justices of the Supreme Court of the Philippine Islands.

160 On April 30, 1904, the following bond was executed, and the sureties thereon approved:

UNITED STATES OF AMERICA, *Philippine Islands:*

In the Supreme Court of the Philippines.

CAMPBELL & GO-TAUCO, Plaintiffs and Appellants,
vs.
BEHN, MEYER & COMPANY, Defendants and Appellees.

Know all men by these presents: That we, Behn, Meyer & Company, as principals, and A. Dittmar and M. F. Loewenstein, as sureties, are held and firmly bound unto Campbell & Go-Tauco in the full and just sum of Six thousand Dollars, U. S. currency, to be paid to said Campbell & Go-Tauco, their attorneys or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 30th day of April, in the year of our Lord one thousand nine hundred and four.

Whereas, lately at a session of the Supreme Court of the Philippine Islands, in a suit pending in said Court between Campbell & Go-Tauco, plaintiffs and appellants, against Behn, Meyer & Company, defendants and appellees, a judgment and decree was rendered against the said Behn, Meyer & Company; and the said Behn, Meyer & Company having obtained from said Court an order allowing an appeal to the United States Supreme Court to reverse the judgment and decree of the aforesaid suit:

Now, therefore, the condition of the above obligation is such that if the said Behn, Meyer & Company shall prosecute the said appeal to effect, and shall answer all damages and costs that may be awarded against them, if they fail to make their plea good, then the above obligation is to be void; otherwise to remain in full force and virtue.

(Signed) BEHN, MEYER & COMPANY.
" A. DITTMAR.
" M. F. LOEWENSTEIN.

Sufficiency of sureties on the foregoing bond approved this 30th day of April, 1904.

(Signed) E. FINLEY JOHNSON,
One of the Associate Justices of the Supreme Court of the Philippine Islands.

161 UNITED STATES OF AMERICA,
Philippine Islands, City of Manila, ss:

I, W. H. Lawrence, Notary Public in and for the City aforesaid, hereby certify that A. Dittmar, presenting cedula No. 225021, issued at Manila April 7, 1904, and M. F. Loewenstein, presenting

cedula No. 216662, issued at Manila December 7, 1903, whose names are signed to the foregoing bond, personally known to me to be the parties aforesaid, personally appeared before me this 30th day of April, 1904, and each made affidavit to the effect that, after the payment of all his own debts and those he is likely to have to pay as security for others, he has assets and property in the Philippine Islands of the value of more than twelve thousand (12,000) pesos Philippine currency.

(Signed) W. H. LAWRENCE,
Notary Public.

My commission expires January 1, 1905.

162 UNITED STATES OF AMERICA:

In the Supreme Court of the Philippine Islands.

No. 1490.

CAMPBELL & GO-TAUCO, Plaintiffs and Appel-ants,
versus
BEHN, MEYER & COMPANY, Defendants and Appellees.

Stipulation.

It is hereby stipulated and agreed by and between counsel in the above-entitled cause that the foregoing pages of typewritten matter contain full, true and correct copies of all the papers appertaining to the said cause and may be certified as such to the Supreme Court of the United States at Washington, D. C., under and by virtue of the order made and entered therein by the Honorable E. Finley Johnson, Associate Justice of the Supreme Court of the Philippine Islands, allowing the writ of error filed in said cause.

PILLSBURY & SUTRO.
W. A. KINCAID.

Filed in the Clerk's office of the Supreme Court of the Philippine Islands this 25 day of Enero, 1906 9.10 a. m.

J. E. BLANCO, *Clerk,*
By H. K. McGEORGE, *Deputy.*

163 UNITED STATES OF AMERICA:

In the Supreme Court of the Philippine Islands.

No. 1490.

CAMPBELL & GO-TAUCO, Plaintiffs and Appellants,
vs.
BEHN, MEYER & COMPANY, Defendants and Appellees.

Come now Behn Meyer & Company, defendants and appellees in the above entitled cause, and represent:

1. That on the 8th day of July, 1903, a judgment was granted in favor of the defendants and appellees in the Court of First Instance for the City of Manila for the sum of $52,000 Mexican currency, together with the costs of the case.

2. That on the 2nd day of April, 1904, this honorable Court reversed the said judgment of the Court of First Instance and gave a judgment against the defendants and appellees in the sum of $9250.62 Mexican currency.

3. That upon the rendering of the said last mentioned judgment the defendants and appellees excepted to the same and asked leave to appeal from the said judgment to the Supreme Court of the United States of America.

4. That on the 30th day of April, 1904, the Honorable E. Finley Johnson, Associate Justice of the Supreme Court of the Philippine Islands, entered an order permitting the defendants and appellees to appeal to the Supreme Court of the United States upon the giving of a bond in the sum of $6,000 United States cur-

164 rency.

5. That on the same day a good and sufficient bond was given and approved by the said Honorable E. Finley Johnson.

6. That thereafter the Clerk of the Supreme Court of the Philippine Islands forwarded a copy of the entire proceedings in the said cause to the Clerk of the Supreme Court of the United States at Washington.

7. That the method which should have been pursued for obtaining a review of the judgment of the Supreme Court of the Philippine Islands in said cause should have been by writ of error instead of by appeal.

Wherefore, Behn, Meyer & Company, defendants and appellees in the above entitled cause, feeling themselves aggrieved by the judgment entered on the 2nd day of April, 1904, come now by Pillsbury & Sutro their attorneys, and petition said Court for an order allowing said defendants and appellees to prosecute a writ of error to the honorable Supreme Court of the United States, under and according to the laws of the United States in that behalf made and provided, and also that an order be made fixing the amount of security which the defendants shall give and furnish upon said writ of error, and that upon the giving of such security all further pro-

ceedings in this Court be suspended and staid until the determination of said writ of error by the United States Supreme Court, and your petitioners will ever pray, etc.

(S'g'd) PILLSBURY & SUTRO,
Attorneys for Defendants and Appellees.

Filed in the Clerk's office of the Supreme Court of the Philippine Islands this 2nd day of January 1906, 9:15 a. m.

J. E. BLANCO, *Clerk.*

165 UNITED STATES OF AMERICA, *Philippine Islands:*

In the Supreme Court.

BEHN, MEYER & COMPANY, Plaintiffs in Error,
vs.
CAMPBELL & GO-TAUCO, Defendants in Error.

Assignment of Errors.

Come now the plaintiffs in error and say, that in the record and proceedings in the above entitled case there is manifest error in this, to-wit:

1. The Supreme Court of the Philippine Islands erred in reversed the judgment of the Court of First Instance for the City of Manila to the effect that the plaintiffs in error were entitled to the sum of $9250.62 Mexican currency, as damages sustained by reason of the faulty construction of the premises in question.

2. The Supreme Court of the Philippine Islands erred in reversing the judgment of the Court of First Instance for the City of Manila granting judgment in favor of the plaintiff in error in the sum of $52,000 Mexican currency, the amount overpaid by the plaintiffs in error to the defendants in error for the delivery of sand.

3. The Supreme Court of the Philippine Islands erred in finding as matters of fact the following:

(1.) That in the construction of the building the contract,
166 plans, and specifications have been complied with, with the exception of a variation to the advantage of the owner, which is that the principal posts rest upon layers of stone, instead of upon the ground as called for by the plan.

(2.) That if there has been any variation from the original plan, this was done largely, if not wholly, with the consent of the owner, and, at all events, with that of his agent, the inspecting engineer, and that these changes have been improvements.

(3.) That the house was constructed under a contract and specifications which did little more than to designate the size of the building, the material to be employed, and, with the plan, gave a drawing of the building, leaving the details necessary almost completely to the direction of the inspecting architect or engineer.

(4.) That the owner entrusted the direction of the work to an

inspecting engineer selected by himself, with full authority to represent him, and that the contractor has performed the work solely in accordance with the direction of the said inspecting engineer.

(5.) That although there is some evidence to indicate that a part of the house has settled more than other parts, this is due either to the ground itself or to a defect in plan, or to the directions of the inspecting engineer, and cannot be attributed to a failure on the part of the contractor to comply with the conditions of the contract.

(6.) If there are any cracks in the floor and in the joints in the building, this is due to the class of lumber which was selected by the owner.

(7.) That the plan of the work and the placing of the
167 principal posts were approved by the city engineer and were in conformity with the ordinances.

(8.) That the owner took possession of the house in the month of May, 1902, and has occupied it since that time as a dwelling-house.

By the very fact of accepting the house and occupying it, the defendants acknowledged that it was constructed substantially as required by the contract, plans, and specifications; and this is the law even when the work is not done according to the contract, but accepted.

4. The Supreme Court of the Philippine Islands erred in not finding that the evidence in the case was not sufficient to justify the Court reversing the judgment of the Court of First Instance.

5. The Supreme Court of the Philippine Islands erred in reversing the judgment of the Court of First Instance for the City of Manila, and in giving judgment against the plaintiff in error in the sum of $9250.62 Mexican currency.

6. The Supreme Court of the Philippine Islands erred in not confirming the judgment of the Court of First Instance of the City of Manila in giving judgment in favor of the plaintiff in error in the sum of $52,000 Mexican currency.

Wherefore, plaintiffs in error pray that the judgment of the Supreme Court of the Philippine Islands be reversed, and that judgment be entered confirming the judgment of the Court of First Instance, and for such other further and general relief as their cause may require.

(S'g'd) PILLSBURY & SUTRO,
Attorneys for Plaintiffs in Error.

Filed in the Clerk's office of the Supreme Court of the Philippine Islands this 2nd day of January 1906, 9.15 a. m.

J. E. BLANCO, *Clerk.*

168 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Justices of the Supreme Court of the Philippine Islands, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the Supreme Court of the Philippine Islands before you or some of you, between Behn, Meyer & Company, plaintiffs in error, and Campbell & Go-Tauco, defendants in error, a manifest error hath happened, to the great damage of the said Behn, Meyer & Company, plaintiffs in error, as by their complaint appears.

We, being willing that error if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all information concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the City of Washington on the 2nd day of March, 1906, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid
169 being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the 2nd day of January, in the year of our Lord 1906.

J. E. BLANCO,
Clerk of the Supreme Court for the Philippine Islands.

The foregoing writ of error is allowed this 2nd day of January, 1906, and the same will act as a supersedeas upon the giving of a bond of sufficient surety in the sum of $12,000 Philippines currency.

E. FINLEY JOHNSON,
One of the Justices of the Supreme Court of the Philippine Islands.

Filed in the Clerk's office of the Supreme Court of the Philippine Islands this 2nd day of January 1906, 9:15 a. m.

J. E. BLANCO, *Clerk.*

Filed 9:15 A. M., Jan. 12, 1906, Sheriff's Office, Manila.

170 UNITED STATES OF AMERICA, *ss:*

The President of the United States to Campbell & Go-Tauco and William A. Kincaid, their attorney, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be held at the City of Washington within sixty days from the date of this writ, pursuant to a writ of error filed in the Clerk's Office of the Supreme Court of the Philippine Islands, wherein Behn, Meyer & Company are plaintiffs in error, and you are defendants in error, to show cause if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, this 2nd day of January, 1906, and of the Independence of the United States the one hundred and thirtieth.

[Seal Corte Suprema, Islas Filipinas.]

E. FINLEY JOHNSON,
One of the Justices of the Supreme Court of the Philippine Islands.

Attest:
J. E. BLANCO,
Clerk of the Supreme Court of the Philippine Islands.

171 UNITED STATES OF AMERICA,
Philippine Islands, City of Manila, ss:

I hereby certify that I served the within citation on William A. Kincaid, attorney for the defendants in error, in the City of Manila, Philippine Islands, by then and there delivering to him the said William A. Kincaid a true copy of the within citation.

Dated at Manila, Philippine Islands, this 2nd day of January, 1906.

JAMES J. PETERSON,
Sheriff de Manila,
Por E. C. KUNDE,
Deputy Sheriff.

Filed in the Clerk's office of the Supreme Court of the Philippine Islands this 2nd day of January, 1906, 12 m.

J. E. BLANCO, *Clerk.*

172 UNITED STATES OF AMERICA:

In the Supreme Court of the Philippine Islands.

CAMPBELL & Go-TAUCO, Plaintiffs and Appellants,
vs.
BEHN, MEYER & COMPANY, Defendants and Appellees.

Know all men by these presents, that we, Behn, Meyer & Company, as principal, and M. F. Loewenstein, as surety, are held and firmly bound unto Campbell & Go-Tauco, plaintiffs and appellants above named, in the sum of Twelve Thousand (P12,000) Pesos, Philippines currency, to be paid to the said Campbell & Go-Tauco, their successors, executors or administrators, to which payment well and truly to be made we bind ourselves and each of us jointly and severally and our and each of our successors, representatives and assigns firmly by these presents.

Sealed with our seals and dated the 2nd day of January, 1906.

Wherefore the above named defendants Behn, Meyer & Company have sued out a writ of error to the Supreme Court of the United States to reverse the judgment in the above entitled cause by the Supreme Court of the Philippine Islands.

Now, therefore, the condition of this obligation is such
173 that if the above named Behn, Meyer & Company shall prosecute said writ to effect and answer all costs and damages if they shall fail to make good this plea, then this obligation shall be void; otherwise to remain in full force and effect.

P. p. BEHN, MEYER & COMPANY,
(Sgd.) MAURICE F. LOEWENSTEIN.

The foregoing bond is approved:
(Sgd.) E. FINLEY JOHNSON,
One of the Justices of the Supreme Court of the Philippine Islands.

UNITED STATES OF AMERICA,
Philippine Islands, City of Manila, ss:

I, W. H. Lawrence, a Notary Public in and for the City aforesaid, do certify that M. F. Loewenstein, personally known to me, whose name is signed to the foregoing obligation, executed the same in my presence and made affidavit that after the payment of all of his own debts and those that he is likely to have to pay as security for others he is worth more than the sum of Twelve thousand (P12,000) Pesos, Philippines currency, over and above all exemptions. Affiant presented cedula No. 157706, issued at Manila, Philippine Islands, April 29th, 1905.

Given under my hand and official seal this 2nd day of January, 1906.

(Sgd.) W. H. LAWRENCE,
[SEAL.] *Notary Public.*

My Commission expires December 31, 1906.

174 UNITED STATES OF AMERICA:

In the Supreme Court of the Philippine Islands.

No. 1490.

The Firm of BEHN, MEYER & COMPANY, Plaintiffs in Error,
vs.
CAMPBELL & GO-TAUCO, Defendants in Error.

I, J. E. Blanco, Clerk of the Supreme Court of the Philippine Islands, do hereby certify that the foregoing is a true and complete transcript of the records and proceedings had in the above entitled cause, and in obedience to the order of the Honorable E. Finley Johnson, Associate Justice of this Court, entered the second day of January 1906 allowing a writ of error from the Supreme Court of the United States to the Supreme Court of the Philippine Islands, the same is transmitted herewith.

J. E. BLANCO,
Clerk Supreme Court, P. I.

[Seal Corte Suprema, Islas Filipinas.]

Endorsed on cover: File No. 20,135. Philippine Islands, Supreme Court. Term No. 227. Behn, Meyer & Company, plaintiffs in error, *vs.* Campbell & Go-Tauco. Filed March 19th, 1906. File No. 20,135.

FILE COPY.

Office Supreme Court, U.
FILED.
FEB 28 1907
JAMES H. McKENNE

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1906.

No. 227.

BEHN, MEYER & COMPANY, Plaintiffs in Error.

v.

CAMPBELL AND GO TAUCO.

BRIEF IN BEHALF OF PLAINTIFFS IN ERROR.

CHARLES C. CARLIN,
HENRY E. DAVIS,
Attorneys for Plaintiffs in Error.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1906.

No. 227.

BEHN, MEYER & COMPANY, Plaintiffs in Error.

v.

CAMPBELL AND GO TAUCO.

BRIEF IN BEHALF OF PLAINTIFFS IN ERROR.

I.

Statement of the Case.

This is a writ of error to the Supreme Court of the Philippine Islands. The suit was instituted by the defendants in error as plaintiffs against the plaintiffs in error as defendants. In their complaint the defendants in error alleged substantially as follows: That, on June 20, 1901,

they contracted, in writing, with the plaintiffs in error, first, to build a dwelling house on land of the plaintiffs in error on the Pasig River, in Manila, as per plans and specifications attached to the contract, for the sum of 13,000 pesos, payable at intervals throughout the progress of the work; secondly, to install a water system to stable, kitchen, etc., and drain tubes from the same, for the sum of 500 pesos, and, thirdly, to construct a stable according to specifications, for the sum of 1,500 pesos, to be paid upon completion of the work; that the defendants in error fulfilled their part of the contract, any delays in the premises having been caused by changes ordered by the plaintiffs in error; that there was due from the plaintiffs in error on account of the dwelling house 1,500 pesos, and on account of water system 500 pesos; that on various dates and after the making of the original contract the parties contracted for alterations and improvements in and to the dwelling house and the premises on which it was situated, for which the entire sum of 5,417.51 pesos was due from the plaintiffs in error; that, on or about May 1, 1902, the plaintiffs in error took possession of the premises, and thereafter occupied them, to the exclusion of the defendants in error; that the successive changes, alterations and additions so far modified the original contract as to change entirely the amount and character of the labor to be performed and material required, as well as the time necessary for completing the contract, and that the defendants in error had carried out the several contracts and made a variety of changes, alterations and improvements outside of their contractual obligations, to the value of $2,333.12: Wherefore the defendants in error prayed judgment for 9,250.62 pesos, with interest. (Rec. 1-3).

The complaint was filed September 30, 1902, and on November 24 following the plaintiffs in error answered, admitting the making of the original contract and denying its

performance; admitting having contracted for certain of the extra work, but denying as to the rest; admitting having taken possession of the premises on or about May 12, 1902, but denying that they did so to the exclusion of the defendants in error, and denying all of the allegations as to the extra work claimed to be of the value of $2,333.12. The plaintiffs in error further alleged as follows: That the defendants in error did not complete the dwelling house according to the plans and specifications, or at all, but abandoned the work about May 1, 1902; that on February 25, 1902, defendants in error, at the request of plaintiffs in error, made a written statement of all work contracted for, and at that time the plaintiffs in error notified the defendants in error that no extra work or changes would be paid for unless agreed for in writing, and that, except as in the answer otherwise admitted or alleged, the plaintiffs in error neither requested nor consented to any changes, alterations, etc., and that all such not admitted or alleged in the answer as were made by the defendants in error were made wholly without the consent of the plaintiffs in error and at the sole risk and cost of the defendants in error. The answer further set forth in detail two counter claims, first, alleging that the defendants in error constructed the dwelling house in a negligent and unworkmanlike manner, and in violation of the contract and specifications in specifically enumerated particulars. In addition to the defects so specified, it was alleged that the workmanship of the entire house in all its particulars was negligent and bad, and the whole structure improperly built; on account of all which the plaintiffs in error have been damaged $30,000, Mexican; and, second, that, on June 20, 1901, the defendants in error contracted with the plaintiffs in error in writing to fill a certain lot on the bank of the Pasig River with earth and sand, at the rate of $1.30 Mexican per cubic metre; that the defendants in error represented to the plaintiffs in error that the amount

of earth and sand used in such filling was 62,690.50 cubic metres, relying upon which representation and the superior knowledge and supposed good faith of the defendants in error the plaintiffs in error paid them $81,497.65, Mexican; whereas, the total amount of earth and sand actually deposited, as defendants in error well knew, was 31,000 cubic metres, whereby the defendants in error were overpaid $41,-197.63, Mexican: Wherefore the plaintiffs in error prayed judgment against the defendants in error for $71,197.65, Mexican. (Rec. pp.3-6).

The defendants in error replied, denying the allegations respecting the first counter claim, and, as to the second, admitting the contract and the payment by the plaintiffs in error of $81,497.65, Mexican, for 62,690.50 cubic metres of filling, alleging that the defendants in error in fact delivered 64,-444 cubic metres of earth and sand, for which they were entitled to receive $83,777.21, Mexican, and praying judgment for the difference, $2,279.55, Mexican, on the second counter claim. (Rec. 8).

Thereupon the plaintiffs in error filed an amended answer, setting forth, first, that there was no way by which the house could be made safe and fit for occupation, except at the cost of 13,000 dollars, local currency; secondly, that the total amount of earth and sand actually deposited was 20,-935 cubic metres, and, thirdly, that they had demanded of the defendants in error repayment of 54,275 dollars, local currency, which had been overpaid, and which the defendants in error had had and received to the benefit of the plaintiffs in error and refused, and still refuse to pay; and praying judgment against the defendants in error for 67,275 dollars, local currency, as follows: $13,000 for damage sustained by reason of the negligent and faulty construction of the plaintiffs in error's property, and $54,275 money had and received by the defendants in error to the use and benefit of the plaintiffs in error. (Rec. 8-9).

The case was tried by the Court, Sweeney, Judge, without a jury, the Court finding facts as follows: That the contract of June 20, 1901, was entered into; that all of the items claimed for by the defendants in error aggregated in claimed value 22,750.62 dollars, Mexican, of which the defendants in error admit payment to the extent of 13,500 dollars, leaving a balance of 9,250.62 dollars, Mexican, as the amount of their claim; that the plaintiffs in error admitted the contract of June 20, 1901, and also an additional contract of December 28, 1901, for 4,000 dollars, making the contractual obligations of the plaintiffs in error in all 19,000 dollars, Mexican; and also that there remained unpaid of the contract price of construction the sum of 6,732 dollars, the payment of which was withheld as damages on account of the faulty construction of the work. And the Court further found as a fact that the plaintiffs in error had paid the defendants in error for at least 40,000 cubic metres of sand and dirt as filling for the lot of the plaintiffs in error, which was not put thereon by the defendants in error, amounting in the aggregate to 52,000 dollars, Mexican. As to the claim and counter claim on account of the construction of the dwelling house, the Court found that the defendants in error were not entitled to any other compensation than they had already received, because of their breach of contract in defectively doing the work, and that the plaintiffs in error were entitled to at least the unpaid balance as damages sustained by them in that behalf. (Rec. 9-12).

The Court, accordingly, adjudged that the complaint of the defendants in error be dismissed, and that the plaintiffs in error recover of the defendants in error 52,000 dollars, Mexican, and costs (Rec., 12).

The defendants in error excepted to this judgment and filed a petition, called in the Record a petition for a new trial, as follows:

> "Appear now the plaintiffs and move the Court that the case be reopened, for the reason that the findings of fact upon which the Court bases its judgment are clearly and manifestly against the preponderance of the evidence in the following respects," enumerating them, and "they also ask the reopening of the case for the following reasons: that the Court committed several errors of law, to the prejudice of plaintiffs, and that the judgment is contrary to law; that the trial was not equally just and impartial as regards plaintiffs and defendants." (Rec. pp. 12-13.)

This petition was heard and denied by the Court, and, as the Record recites, "to which decision plaintiffs likewise excepted, at the same time notifying the Court of their intention to prepare, perfect, etc., a bill of exceptions in appeal." (Rec. p. 12.) If there be a bill of exceptions in the Record it consists in the testimony, affidavits, etc., set forth on pages 15 to 96 of the Record, beginning with this introduction: "The following is the evidence introduced by both parties at the trial, with the exceptions taken, and which do not appear elsewhere in the Record" (Rec. p. 15), and ending thus: "The foregoing bill of exceptions having been presented for its approval on the 7th of August, 1903, by the plaintiffs in the above entitled matter, and defendants having been duly notified and an opportunity afforded them to be heard in regard to the correctness of said bill of exceptions, and the undersigned Judge, having examined the same and being of opinion that the facts as stated are correct, said bill of exceptions is hereby approved and ordered filed with the Record in this matter." (Rec. p. 96.)

On the appeal, the appellate court, overturning the findings of fact of the trial court in that behalf, found that the work on the building had been done in substantial compliance with the contract, and held, as matter of law, first, that "by the very fact of accepting the house and occupying it, the defendants acknowledged that it was constructed substan-

tially as required by the contract, plans, and specifications; and this is the law even when the work is not done according to the contract, but accepted" (Rec. p. 101); and, secondly, that, as there was no mutual mistake of fact in the measure of the sand and earth, the plaintiffs in error were estopped, and could not claim for any over-payment (Rec. p. 105). The Court, therefore, reversed the trial Court, and gave the defendants in error judgment for the balance claimed by them on the work on and about the dwelling house, namely, 9,250.62 dollars, Mexican. (Rec. p. 105.)

It is particularly to be noted that the appellate court made no finding of fact as to the amount of sand and earth put upon the lot, but in terms avoided so doing, as shown by its language, as follows: "The evidence, therefore, is uncertain, and does not enable us to accurately determine the exact number of cubic feet of sand or earth delivered on the lot." (Rec. p. 103, fol. 154.)

II.

Assignments of Error.

The Court below erred as follows:

1. In reversing the judgment of the Court of first instance.

2. In awarding the defendants in error $9,250.62, Mexican, or any sum.

3. In not affirming the judgment of the trial court in favor of the plaintiffs in error for $52,500, Mexican.

4. In finding as a fact that the work done in and about the dwelling house was performed in substantial compliance with the contract relating thereto.

5. In holding as matter of law that the fact of taking possession of the said dwelling house was an acknowledg-

ment by the plaintiffs in error that it was constructed substantially as required by the said contract.

6. In holding as matter of law that the plaintiffs in error were not entitled to recover their over-payments for earth and sand because no mutual mistake was shown in the premises.

7. In rendering judgment for a sum in Mexican currency instead of in Philippine pesos.

III.

ARGUMENT.

We will consider first the questions of law, which are, in the main, two: first, as to the effect of taking possession of the house, and, second, the nature and extent of the right to recover money paid through mistake.

The Effect of Taking Possession.

1. The fact of taking possession of a building upon the owner's own land does not of itself imply a waiver of performance, or have any real meaning as to such.

The cases on this point are so numerous and clear as to leave no room for doubt.

The court below, holding that the fact of taking possession of the house and occupying it was an acknowledgment that it was constructed substantially as required by the contract, added that in such case the owner receiving the house shall be bound to pay the full or reasonable worth of what he receives. It is accordingly deemed advisable to consider under this head, in effect, two questions, namely, what is the meaning and effect of taking possession, and what is the rule of damages where possession has been taken of a build-

ing not constructed in full compliance with the provisions of the contract.

> "In building contracts where the house is built upon the property of him who has it built, acceptance and use of the work, knowing it was done in accordance with the contract, is not a waiver. The owner is powerless to do anything else, unless he should pull the house down."
>
> Mohney v. Reed, 40 Mo. App., 99, 112.

> "The defendant might object to the work if he were cognizant of its defects, but it was on his building and had become a part of his property, and he could not very well reject it unless he tore it from the building and cast it away. The question in all such cases as this is whether there has been a waiver of defects, and not whether there has been an acceptance and use of the work. Use of the work is not necessarily a waiver of its defects. There must be both knowledge and acquiescence to constitute a waiver."
>
> Haysler v. Owen, 61 Mo., 270, 274.

> "The effect of acceptance in the present cases and cases of similar kind, in establishing a waiver on the part of the defendent of any rights he had under the contract, is certainly difficult to be maintained. When the work and labor and materials have been expended in the production of an article contracted for, not connected in any way with the property belonging to the party at whose instance the work has been done, the latter is at liberty to accept the same or not, as he chooses, and if he does accept, that is certainly a very clear indication of an intention to waive any defects so far as such defects might conduce to a defense against any recovery. * * * But where the plaintiff or contractor has done work on the house of the defendant, the fact that the defendant continues to live in his house can hardly be regarded as an acceptance of the work, as a waiver. * * * But

this idea of acceptance, as a waiver, is not the ground upon which the courts have allowed a recovery on a *quantum meruit* count. It is because the work is of no value to the proprietor, and if it is of no value there can be no recovery,"

Yeats v. Balentine, 56 Mo., 530, 538-9.

"In an action for the recovery of the contract price of a building, the fact that the defendant has accepted the building will not preclude him from recouping the damage he has sustained by reason of the plaintiff's omission to complete the building in time, or according to the specifications of the contract."

Adlard v. Muldoon, 45 Ill., 193.

"The instruction given by the Court * * * confounds the ordinary use and possession of the house in question by the defendant with the true legal idea of an acceptance. * * * Such acceptance is not manifest alone by use and occupation, for the reason that the house was built upon defendant's land, became incorporated with the realty, and the property thereof vested *nolens volens* in him. He had no choice but to use it, whether built according to contract or not, and such use, under protest, accompanied with complaint that the contract had not been performed by the undertaker could not be a waiver of his right to insist upon the due execution of the contract."

Corwin v. Wallace, 17 Iowa, 374, 376-7.

"The most common cases where questions arise as to the effect of acceptance and approval of acts done by others, are the cases of work done by contract, where the attempt is to resist payment of a full price, because of the defective character of the materials or workmanship. The general rule undoubtedly is, that if a party received, without objection, an article made for him by contract, having a reasonable opportunity to examine and know whether it is conformable to the contract, this is evidence that the party accepts it as a performance of his contract, and, if so accepted, is bound.

"The evidence results from the union of three circumstances: The voluntary receipt, the absence of objection, and the knowledge or opportunity to know the defects. The rule by no means applies equally to all classes of cases. It hardly applies, or with slight force, in cases where the party has no option to receive or reject the labor or services performed, where he has no means, or such as are imperfect, to know the defects or objections, or where he declares his objections, thus negativing any assent. Whenever the service performed is done upon the property of the employer, and cannot be separated, the owner has no power to reject, or refuse to receive it. A man who receives back his horse from a farrier furnishes no evidence that the animal has been properly shod, or that he is satisfied with the work. If he knows, and does not object, these facts together are evidence of acquiescence.

"In most cases where work and labor is performed upon real estate by contract, the mere fact that the owner makes use of the building or structure built upon his land, furnishes no evidence of approval or acceptance, because he has no choice to reject it. He cannot remove it from his premises without greatly injuring or destroying its value, nor can he remove it so as to render it useful to himself. The property has vested in the owner of the land, and he cannot divest himself of it except by the assent of others; and in the case of buildings erected upon his own land, for his own use, he has no choice but to use them as they are, whether they are satisfactory or otherwise.

"Alone, the use of such buildings gives no evidence of acceptance. Accompanied by silence and the absence of complaint, where to complain would be natural and suitable, or by any circumstances indicating acquiescence, it would be evidence."

Wilson v. School District, N. H., 118, 124-5.

Taking possession of real estate after work in constructing buildings has been done thereon and the contractor has left the premises, and appropriating to the

owner's use and benefit the labor and materials of the contractor does not constitute an unequivocal acceptance of the work, although it may be taken into consideration in determining that matter.

"When a person contracts with another to build, or to do some portions of the work in constructing, buildings upon real estate belonging to the owner of such real estate, his taking possession after the other has left the premises cannot be construed as an unequivocal acceptance, although he thereby takes possession of, and appropriates to his use and benefit, the labor and materials of the contractor. He must do so as a matter of necessity, in many cases, or suffer the property to stand idle and unused, to the great detriment of all parties, and especially so of the owner. The most that can be said in such cases is that the acts of the party and all the circumstances may be taken into consideration in the determination of the question whether there is an implied waiver of the condition precedent."

Hanley v. Walker (Mich.), 8 L. R. A., 207.

Where a contractor undertakes to build a house complete, and after doing a small portion of the work, abandons it without any default on the part of the owner, and the latter enters upon the premises and completes the house, making use of the contractor's unfinished work, the contractor cannot recover for what he did, nor can a sub-contractor recover from the owner for materials furnished such contractor. "It may be said that the plaintiff in error ought not to avail himself of the benefit of what has been done upon the contract, without paying what it was reasonably worth. But what was the appellant to do? Abandon his building site entirely? Could he not complete his house upon his lot, and even upon the foundation laid, without rendering himself liable to pay his defaulting contractor for what he had done? We think he might."

Malbon v. Birney, 11 Wis., 107, 110.

Where one party has entered into a special contract to perform work for another and to furnish materials, and the work is done and the materials furnished, but not in the manner stipulated for in the contract, so that he cannot recover the price agreed on in the contract; yet if the work and materials are of any value and benefit to the other party, it seems that he may recover on a *quantum meruit* for the work done, and on a *quantum valebant* for the materials. In such case the proper measure of damages is the contract price of the house, deducting from it so much as the house was worth less on account of variations from the contract.

"When we speak of the law allowing the party to recover on a *quantum meruit* or *quantum valebant*, where there is a special contract, we mean to confine ourselves to cases in which there is an honest intention to go by the contract, and a substantive (substantial?) execution of it, but some comparatively slight deviations as to some particulars provided for. Cases of fraud or gross negligence may be exceptions."

Hayward v. Leonard, 7 Pick., 181,187.

Where the work is so done as to be useless, there can be no recovery. "It would be a reproach to the law if the plaintiff could recover the stipulated price of the work which he undertakes to perform, when by the evidence in the case it manifestly appears that the defendant would be entitled to a larger sum from him as damages for the non-performance of his contract with them."

Taft. v. Inhabs. of Montague, 14 Mass., 282, 285.

"The fact that the appellants took possession of the building cannot be considered as an acceptance of the work. The building was owned by them, and upon their premises, and they cannot be required to abandon it altogether so as to enable them to maintain an action for damages. They had no alternative but to take possession as they did, protesting all the while

that appellees had failed to comply with their agreement."

Escott v. White, 10 Bush, 169, 173.

Where a contractor builds a house on a lot for the owner thereof, the latter is not debarred of an action against the former to recover damages for a non-compliance with the contract, on the ground that he had accepted such house from the contractor, whether cognizant or not of such non-compliance at the time of the acceptance.

"When a house is built on a lot in a city, which if unimproved, is a source of great expense, how can we speak, with any propriety of language, of the owner's accepting a house built upon it? The lot is in his possession already; the buildings put upon the lot become a part of it. * * * The fact that the house has been used is a matter to be weighed by the jury with all the other circumstances of the case as bearing upon the question how far acceptance raises a presumption that the work met the contract requirements; and in the case of a building contract the fact of acceptance may be used with much less force than in the case of a sale of goods."

Stewart v. Fulton, 31 Mo., 59, 61.

"The party failing to perform can only recover such a sum as his labor has benefited the other party. Had he strictly and literally kept his agreement, he would have been entitled to the contract price. Failing in this, first, he must deduct from the contract price such a sum as would enable the other party to get the contract completed according to its terms; or, where that is impossible or unreasonable, such a sum as will fully compensate him for the imperfection in the work and the insufficiency of materials; so that he shall in this respect be made good pecuniarily as if the contract had been strictly performed; second, the party failing to perform must also deduct from the contract price whatever additional damages his breach of the contract may have occasioned to the other. In many cases

these damages would be considerable; in others, they might be nothing.

"It is only by considering both of these elements that we can ascertain the benefit which the one may have derived from the labor of the other, when measured by the contract and the contract price."

Bragg v. Bradford, 33 Vermont, 35, 39.

"The next case to consider is that of a party who has not fully performed, and has not been discharged from, the contract, or excused from further performance. His right to ignore the contract and recover a reasonable compensation for work done is to be determined by answering one or both of the following questions: (1) Has a partial performance for which recovery is sought resulted in financial benefit to the party from whom it is sought? (2) Is such default wilful, or is it caused by something beyond the control of the party in default, though not amounting to a discharge of his liability? If the partial performance for which recovery is sought has not resulted in financial benefit to the party against whom recovery is sought, the party who has performed such services cannot recover in any event. The fact that performance was prevented by some external fact beyond his control, or that the partial performance was expensive to him, neither of them gives him any right to recover more than the amount of the benefits conferred upon the party against whom the recovery is sought and if no such benefits existed, there is no right to recovery."

3 Page Contracts, Sec. 1601.

"A person receiving benefits without knowing of the breach, and if the benefits are of such sort that it is impossible for him to return the benefits to the adverse party, it is difficult to say why the party not in default should be held for liability which he did not assume by his contract. Thus, it has been held that as the owner of land on which a house has been built has no real choice in accepting or rejecting it, he is not liable to pay reasonable compensation therefor,

if the contractor does not complete the contract, at least substantially."

3 Page Contracts, Sec. 1605.
Dermott v. Jones, 23 How., 220.
Elliott v. Caldwell, 43 Minn., 357.

"To entitle a party to recover for part performance or for performance in a different way from that contracted for, his contract remaining open and unperformed, the circumstances must be such that a new contract may be implied from the conduct of the parties to pay a compensation for the partial or substituted performance. The mere fact that the partial performance is beneficial to a party is not enough from which to imply a promise to pay for it. Hence, in the case of a building on land which the builder fails to complete, or completes in a manner not substantially conforming to the contract, the mere fact that it remains on the land and the owner enjoys the benefit of it, he having no option to reject it, is not such an acceptance as will imply a promise to pay for it, notwithstanding the non-performance of the said contract; for the possession of the land necessarily involves possession of the buildings in their existing state, and the owner has no option of rejecting them."

Elliott v. Caldwell, *ubi supra.*

The cases cited by the Court below in its opinion in no wise militate against the rule clearly appearing from the foregoing authorities.

In Duell v. McCraw, 86 Hun. 331, the owner was let into possession of the house in knowledge of its condition, at her own request, and upon an express undertaking as to payment; and it was held that the conduct of the defendant operated a waiver of the architect's certificate as to the final payment provided for by the contract.

Where a contractor fails to perform his agreement to erect a building, and, after the expiration of the time fixed for performance, abandons the premises and the

owner goes on and completes the building, the owner's damages are the difference between the value of the premises as they were when abandoned by the contractor and what their value would have been had the building then been completed according to contract.

> "The plaintiff was entitled on the 1st of September, 1877, that there should be finished houses rentable and productive of income with which to keep down interest on the mortgages on the lots, the taxes thereon and insurance premiums. He could not on that day, had he been let into immediate possession and control, by any expenditure of money or energy have completed them at once; nor, in the nature of things, could he have supplied the lack of the completed houses by purchase in the market. The work needed to complete was one of time, and, while the time was running, interest was running also, taxes were levied, insurance was to be kept up, and the premises were yielding no rent. It is plain that to repay him just what he expended to finish the building would not make him whole; for he had to pay, beside the cost of building, interest to Granniss, and lose interest on his own mortgages, and pay taxes and premiums. To put him in as good predicament as he would have been had the buildings been done on the 1st of September, 1877, he should have the difference in value between the buildings thrown on his hands unfinished, and the houses as they would have been if completed according to the contract. This seems to establish the rule that will give him full compensation."
>
> Kidd v. McCormick, 83 N. Y., 391, 398.

The Court evidently meant to say that the plaintiff should have the difference in value between the buildings thrown on his hands unfinished and the value to him of the houses as they would have been if completed according to contract.

By a contract between plaintiff and defendant, the former bound himself, among other things, to put certain roads in good repair within sixty days, it being stipulated that the contractor should be deemed in default by the mere act of his failure in any particular, and the City Council was so authorized to declare it without applying to a court. More than a week having passed and the plaintiff not having commenced work, the City Surveyor advised that the contract be declared forfeited; but this advice was not immediately acted upon, and the plaintiff began the work, and before the sixty days had elapsed put most of the roads in repair. The city then declared the contract forfeited, and the plaintiff brought suit for damages. *Held,* that though the city had the right to forfeit the contract for neglect on the part of the plaintiff, it was yet not competent for it, after having been notified of the neglect of the plaintiff to complete the work subsequently, to stand by and see him prosecute the work without objection, and then insist upon such delay in the commencement as a forfeiture, and that, although the plaintiff did not complete them according to his contract, he was entitled to compensation for the benefit which the city derived from his labor.

Corland v. New Orleans, 13 La. Ann., 43.

A plaintiff may recover under a count upon an account annexed for work done and materials furnished in building a house upon a special contract, which he has substantially performed, and the measure of damages is the contract price, deducting the diminution in value of the house to the defendant caused by deviation from the contract.

Cullen v. Sears, 112 Mass., 299.

If a person elects to accept or accepts work imperfectly performed, according to contract, the benefit for which he is liable to be charged is the amount of value which he has received, if any, beyond the amount of the damage. The implied promise which the law raises is that he will pay such amount of the stipulated price for the whole labor as remains after deducting what it would cost to procure a completion of the whole service, and also any damage which has been sustained by reason of the non-fulfillment of the contract; but, if, in such case, it be found that the damages are equal to, or greater than, the amount of the value of the labor performed, so that the employer, having a right to the performance of the whole contract, has not, upon the whole contract, received a beneficial service, the contractor cannot recover.

Britton v. Turner, 6 N. H., 481.

And as respects this last case, see the comments thereon in *Davis v. Barrington*, 30 N. H., 517, 529, and the notes in 26 Am. Dec., 722, to the case itself, and in 19 Am. Dec., 272, to the case of *Haywood v. Leonard*, above cited.

Right to Recover Money Paid by Mistake.

2. We consider next the question of recovery of money paid by mistake.

For this case the question would seem closed by the express provisions of the law of the Philippine Islands.

> "If a thing is received when there was no right to claim it, and which, through an error, has been unduly delivered, there arises an obligation to restore the same." (Article 1895, Civil Code.)
>
> "It is presumed that there was an error in the payment when a thing which was never owed or which

was already paid for has been delivered, but the person from whom the return is asked may prove that the delivery was made through liberality or for any other sufficient cause." (Article 1901, Civil Code.)

And the principles expressed in these enactments are the same as those generally recognized and administered.

A person who, under a mistake of material fact, makes a payment which he is not under legal liability to make can recover the money thus paid if the other elements necessary in an action to recover payments are present. In other words, such payments are not looked on as voluntary payments.

2 Page Contracts, Sec. 818.

Where payment is made by one who is under no legal liability, under mistake of fact as to the existence of such liability, the weight of authority is that such payment may be recovered even if the party making it could have discovered his mistake if he had used proper diligence. The mere fact that the party making the payment had the means of knowing the facts does not prevent him from recovering. It is not the means of knowledge possessed by the party making the payment, but his actual knowledge or ignorance of material facts that determines his right to recover.

2 Page Contracts, Sec. 824.

Money paid under a mistake of fact may be recovered back, although the party making the payment has access to information, and by his own laches neglects to acquire it. Payment is not voluntary when made in consequence of a mistaken view of facts.

Baltimore, etc., Co. v. Faunce, 6 Gill., 68.

In this case the Court said (p. 77):

> "The case of Kelly v. Solari, 9 M. & W., 54, was fully considered. There the parties paying had at one time a knowledge of the fact, the forgetfulness of which subsequently induced them to make the payment. The Chief Baron, at *nisi prius*, instructed the jury that the previous knowledge or means of knowledge would prevent the recovery; but, on argument, he united with all the other Barons in the opinion that there must be knowledge existing in the mind at the time of the payment. Of what avail is it, in any view of justice or sound sense, that a man once knew or had means to know a fact, if, at the moment when alone such knowledge is particularly useful, he is actually ignorant of it?"

If money be "paid under the impression of the truth of a fact which is untrue, it may, generally speaking, be recovered back, however careless the party paying may have been in omitting to use due diligence to inquire into the fact."

Kelly v. Solari, 9 M. & W., 54, 59, per Parke, B.

> "Then there is a third case, and the most difficult one, where the party had once a full knowledge of the facts, but has since forgotten them. I certainly laid down the rule too broadly to the jury when I told them that if the directors once knew of the facts they must be taken still to know them, and could not recover by saying that they had since forgotten them. I think the knowledge of the facts which disentitles the party from receiving, must mean a knowledge existing in the mind at the time of payment."
>
> Kelly v. Solari, 9 M. & W., 54, 57, Abinger, C. B.

The rule and its reason have never been better stated than by the Court of Appeals of Maryland:

"It is a well-settled principle that, if a party, through some mistake, misapprehension or forgetfulness of facts, receives money to which he is not justly and legally entitled, and which he ought not, *in foro conscientiae*, to retain, the law regards him as the receiver and holder of the money for the use of the lawful owner of it, and raises an implied promise on his part of pay over the amount to such owner; and if the money be withheld from the owner, an action for money had and received may be maintained."

George's Creek, etc., Co. v. Commissioners, 59 Md., 255, 259-60.

Where money is paid upon the supposition that a specific fact which it is supposed would entitle the other to maintain an action is true, which fact is not true, an action will lie to recover the money back "upon the ground that the plaintiff has paid money which he was under no obligation to pay, and which the party to whom it was paid had no right either to receive or retain, and which, had the true state of facts been present in his mind at the time, he would not have paid."

Ingalls v. Miller, 121 Ind., 188, 190.

To contend to the contrary would be to contend that legal responsibility is matter, not of intelligence, but of alertness of memory; that a momentary lapse of memory is legal default; and that Homer, for his occasional nods, might properly have been mulcted in damages at the suit of Horace. Et idem indignor Quandoque bonus dormitat Homer. Horace: *Ars Poetica.*

If A pay money to B in performance of a contract between them, under the mistaken belief on A's part that B has performed such contract fully, A may recover such payment. Thus, where B had agreed to plaster a house for A, and A paid him, believing that such work had been done,

he may recover the money thus paid where the work is of such inferior quality as to be valueless.

Nollman v. Evenson, 5 N. D., 344 (quoted in Page, Sec. 819).

Where a city engineer, by mistake, estimated the area paved to be about 3,000 square yards more than it really was, and, in reliance upon such estimate, the city paid the contractor for the entire amount of the engineer's estimate at the rate of $1.00 a square yard, it was held that the city could recover from the contractor on learning of the mistake.

Duluth v. McDonnell, 61 Minn., 288. *Ibid.*

Where a payment is made under a mistake in putting the weight of the articles sold, on which weight the payment is based, money paid under such mistake may be recovered.

McRae, etc., Co. v. Stone, 119 Ga., 516.

While the mistake under which payments whose recovery is allowed are made may be mutual, it is not necessary to recovery that it should be mutual. The doctrine of mutuality of mistake applies primarily to mistakes in expression, and has no application to payments by mistake.

Stotsenburg v. Fordice, 142 Ind., 490. (A very well-considered case.)

In an action to recover back money paid by mistake, it is no defense that the plaintiff had means at his command of ascertaining the truth, and that he omitted to use vigi-

lance and care. Nor is it a defense that the defendant can not be restored to his original position upon paying back money.

Kingston Bank v. Eltinge, 40 N. Y., 391, 100 Am. Dec., 516.
See Devine v. Edwards, 87 Ill., 177.

Discussion of Facts.

In discussing the facts in this case, we shall do so, first, with reference to the contract relating to the house, and, secondly, with reference to the contract relating to the filling of the lot of ground upon which the house was constructed. These were the only two issues of fact.

First: The defendants in error, to maintain the issue on their part, called six witnesses on direct examination, and two of the same witnesses again in rebuttal, while the plaintiffs in error called four witnesses.

The testimony of the witnesses called by the defendants in error on direct examination related largely to the construction of the house, in an effort to show that the structure was erected in accordance with the specifications and plans, and that the work was conducted under the supervision of a Mr. Duff, and subsequently a Mr. Cook, who were representatives of the plaintiffs in error.

An examination, however, of the testimony, discloses the fact that the faulty construction consisted principally in the manner of the work done upon the piers upon which the structure rested, and the defective roof, the faulty construction of the rafters supporting the same, and the general unworkmanlike manner in and about the entire structure, eliminating, to a large extent, the question of materials, and reducing the controversy to the question of negligent, im-

proper and unskillful workmanship. The defendants in error undertook to escape responsibility for such by reason of the employment of the aforesaid representatives at the work. In this they entirely failed, as will be seen by the testimony of Mr. O. F. Campbell, one of the defendants in error (Rec., p. 19), which is as follows:

> "Q. When did Mr. Duff, who you said was one of them, begin his work as supervisor of that building for Behn, Meyer & Co.?
>
> A. He began when he ordered the change of those posts. It was shortly after we had commenced the work on the building that Mr. Duff came out there and first gave us levels for the sand, and afterwards went over the house and made the modifications that he deemed necessary in regard to the foundations and the posts."

Again (same page) the witness testified as follows:

> "Q. At what stage, Mr. Campbell, was the house when Mr. Duff first appeared upon the scene?
>
> A. I think, as I remember, that some of the posts were up, and some of the joists and tie beams were already on.
>
> Q. Was the house in condition for him to go over it?
>
> A. Yes, sir. We went up on the ladder and went over these joists and looked at the timber."

The foregoing testimony of Campbell, one of the defendants in error, shows conclusively that the piers, fifty-four in number, about which the principal controversy here arises, were constructed, and upon them the building, or a large portion thereof, was under process of erection when Mr. Duff first came upon the scene, which, according to defendants in error's witness Dittmar (R., p. 30) was about the middle of October; and according to the witness Campbell (R., p. 19) the building was begun in September. And by

the reading of the testimony of the witness Campbell, as above quoted, the faulty construction of the piers, which consisted in the failure to place the same properly upon cement bases, was, at the time of Duff's appearance, concealed beneath the ground, and the defects could only have been subsequently disclosed, as they were by the examination of the experts, Case and Loper, who dug down to the base of the said piers and discovered the negligent, unskillful and unworkmanlike manner of their construction (R., pp. 42 and 58); and the further fact that they were not constructed in accordance with the plans and specifications, as will be seen from the testimony of Major Case (R., p. 42), which is, in part, as follows:

> "I made my first examination on January 11th, and have my field notes here. In the first place, the specifications for the foundations provided that the posts should be set on a stone foundation of one cubic meter —1 meter x 1 meter x 1 meter; several of these foundations have been dug out, exposed, and I examined them; two of those footings I found with the foot of the post set in the middle, running down half way through this stone foundation, giving only half of a cubic meter of foundation under the post; the balance of the stone work above the foot of the post gave no advantage whatsoever to the foundation. I examined five of these posts altogether."

From this defective construction the cause for the water running into the dining-room, instead of running off from the porch, is easily discernible, and that falling water had found such a course is proven by the testimony of Major Case (R., p. 42), which, in part, is as follows:

> "This porch, in place of sloping towards the outside, so as to drain away from the house, actually slopes into

the house, so that any rain going on to the porch will run into the house."

And again, on page 43, the same witness testifies as follows:

"Q. Now, Major, as to the posts that you examined, you state that you examined five of the posts. Were they the main posts of the house, or the posts of the porch?

A. They were all of the main posts of the house.

Q. Were the posts that you examined the important posts for maintaining the structure of the house?

A. Some of them, yes, sir."

It is impossible to read the testimony in this case without concluding that the piers supporting the posts, which in turn supported the house, were so defectively constructed as not to furnish the support designed, and that the house, as a consequence, had sunk, which is proven by the testimony of the same witness (R., p. 43), which is as follows:

"The second floor is quite noticeably uneven. In my opinion, this is due to settlement of the house."

Again the same witness (same page) testified as follows:

"The roof trusses at the hips have pulled apart. In my opinion this is due to the settlement of the house toward the edges, where it carried the heaviest load towards the walls, while in the center of the house, supporting the king post that runs to the peak of the roof, that did not settle so much, and the settling of the outside, in my opinion, is the cause of pulling the main rafters apart from the king post."

This witness is corroborated by the testimony of Robert M. Loper, a witness called for the plaintiffs in error (R., pp. 58-9), which is, in part, as follows:

"I found, by examining the foundations of five posts carrying the greater part of the weight of the building, that the foundations for the posts were respectively a half meter below the bottom of the posts for three of the posts, or three layers of Guadalupe stone * * * or say, approximately, about sixty-five centimeters in depth. * * * The condition of the roof structure, the frame work of the roof showed that there had been a settlement of the building * * * the settlement of the building showed the indisputable fact that the posts carrying the main wall of the building had settled considerably more than the other posts, as evidenced by the fact that the second floor was dished in, or depressed in towards the center from the outer porch, the result of which would be that any water getting in any way upon the porch floor itself would flow into the house. * * * The evidence of the building having settled was further manifest by the fact that the rafters in every case, in some cases more than others, but in every case, they had pulled away from the king post."

The same witness, on page 60, testified as follows:

"If by workmanlike work is meant work that is done by a good carpenter, I would say it wasn't a workmanlike job."

These two witnesses are corroborated by the testimony of Arnold Dittmar (R., p. 75), as follows:

"Q. You state that the water came in the doors?
A. Yes.
Q. Describe it.
A. Well, the balcony goes sloping in that direction; consequently when the rain comes on to the balcony it must run with the slope into the dining-room. Furthermore, there used to be a big pool of water in front as soon as the rain came. It was sloping, too, and the water couldn't run off."

The evidence of the plaintiffs in error discloses other important and serious defects in the workmanship throughout the entire building, the roof itself being seriously defective and faulty, with large holes through which daylight could be seen. (Testimony of James F. Case, R., p. 44).

But it is not deemed essential to go further into details except to say that this state of facts is not refuted by any of the witnesses for the defendants in error. There were only three witnesses called by the defendants in error who testified upon the question of faulty structure, namely, Delmar W. Smith, who testified to the effect that THE HOUSE WAS HABITABLE (R., p. 34); Vicente W. Pastor, who testified to the effect that he saw few, if any faults or defects in the construction of the house, and Cayetano Arguelles, who testified to the same effect, the latter witness, however, distinctly testifying with reference to the pillars and posts (R., p. 40), WE HAVE NOT HAD SUFFICIENT TIME TO CAREFULLY EXAMINE THEM.

It will therefore be seen from the testimony that the defective work, which resulted in the greater and subsequent injuries, was done before the appearance of the representatives of the plaintiffs in error, or occurred as the result of such defective work at or about the time that possession was taken of the property, and that the examination of the experts, Case and Loper, disclosed beyond any question, the conditions referred to. It therefore becomes proper to examine the testimony to see what was the nature of the acceptance and the manner in which the property was taken over by the plaintiffs in error.

The defendants in error in the trial Court, as in the appellate Court, relied upon the taking over of the property by the plaintiffs in error as a waiver of the defective workmanship and faulty and negligent construction.

And this brings up to the consideration of the facts as disclosed by the record, relating to the taking over of the property. And strange as it may seem, the record is almost silent upon the circumstances incident to the taking over of the property. Campbell, one of the defendants in error, on page 17 of the Record, testified as follows:

> "Q. Will you state when you made this delivery?
> A. I think it was about the first of May, a little bit more or less.
> Q. Of this year?
> A. Of last year, and they, I believe, entered the house about the tenth or the twelfth day of May of last year."

And Mr. Dittmar, one of the plaintiffs in error, on page 75 of the Record, testified as follows:

> "Q. Mr. Dittmar, did you ever accept by any writing or any agreement with Campbell and Go Tauco, the house as finished?
> A. No.
> Q. Why did you refuse to accept it, if you refused?
> A. The house had too many defects. I had to live in it, but practically it was not habitable."

It will be remembered that the complaint in this case did not allege any acceptance, but only "that defendant took possession of said premises." (Par. 7 of complaint.)

The above testimony, coupled with the fact that the plaintiffs in error withheld the balance of the money due, amounting to about forty-five hundred ($4,500) dollars in United States currency, the latter a significant circumstance, is all that the Record discloses about the taking over of the property; but as the house was constructed upon the land of the plaintiffs in error, there was nothing left for them to do

but to take possession thereof, or else to leave their land in the possession of the contractor, and it will appear, when we discuss the question of the land, and the filling therein, that on April 28, a few days prior to the taking of possession of the house, the plaintiffs in error notified the defendants in error that they were dissatisfied with the filling of the land, and that they would require to be reimbursed by them (R., pp. 86-7). About two weeks afterwards, they moved into, and took possession of the house and the land. It is therefore contended that within the rule of law, as understood by the plaintiffs in error, there was no such acceptance as would constitute a waiver of defective workmanship, and indeed, the testimony shows that there was no intention of waiver, and that the defendants in error had notice that it was the intention of the plaintiffs in error to assert their rights, and that the finding of the lower Court with reference to this item was correct. Said finding will be found on pages 11 and 12 of the Record and is as follows:

> * * * "Clearly establishes that the building in question was not constructed according to the contract; that the foundation is so constructed that the center of the building, where the great weight is, has settled much more than the outer support, and that causes the water that falls on the porches and outer parts of the building to run in on the floors of the rooms. From the proof, the plaintiffs must have entrusted this work to a lot of unskillful, careless men as carpenters, without any attention from the plaintiffs. The preponderance of the evidence is that it will cost to put this property in a condition to comply with the plans and specifications and contracted alterations 62½ per cent of the contract price." * * * "I have concluded that an equitable adjustment of this matter is to deny the plaintiffs any other compensation than they have already received, because of their breach of contract in so defectively constructing the improvements of the defendants; and that the defendants are entitled to at least the unpaid

> balance as damages sustained by them on account of the manner in which these improvements were constructed by the plaintiffs.'

The appellate Court, in reversing the findings upon this branch of the case of the trial Court, proceeded upon a mistaken idea of the law, that the acceptance of the property was a waiver of all defects of workmanship; and upon a mistaken idea as to the time that the representatives of the plaintiffs in error went upon the property for the purpose of observing the work, and lost sight of the fact that the representatives or inspectors did not appear until after the pillars were in the ground, for upon pages 99-100 of the Record, the appellate Court says:

> "The plaintiffs are not to be held in damages for following these plans, especially when they were followed under the eyes of the defendant's engineer and without objection from him."

It would seem that the construction of this house was wholly without and devoid of intelligent workmanship, as illustrated by the fact that when the house was completed, it was found that there was no door by which it might be entered, and that the owner, who had been absent in Europe, upon his return had to order a door to be cut in the same, and this was made an item of extra charge by the contractor. (R., top p. 80).

Second: The contract for the filling of the lot of ground, was made on the same day as the contract for the construction of the house, viz., June 20, 1901 (R., p. 7), and they were practically one and the same contract, except that they related to different departments of work and were under different writings. The parties were the same, and the acts contemporaneous. The contract for the filling of

the lot provided that the plaintiffs in error should pay the sum of one dollar and thirty cents ($1.30), Mexican currency, per cubic metre. The work was begun and the plaintiffs in error from time to time paid for the same in the total sum of eighty-one thousand, four hundred and ninety-seven dollars and sixty-five cents ($81,497.65), Mexican currency, for the supposed delivery of sixty-two thousand, six hundred and ninety and fifty-one one-hundredths (62,690.510) cubic metres of earth and sand, when it was discovered that there was a *mistake* in the measurement by the person, an employee of the plaintiffs in error, whose duty it was to make measurements for the same; whereupon, the plaintiffs in error, on the 28th day of April, 1902, before taking possession of the same, possession having been taken on the 12th of May, 1902, wrote the defendants in error as follows (R., bottom p. 86, Exhibit K (3).):

"MESSRS. CAMPBELL & GO TAUCO,
Manila.

GENTLEMEN:

Your bills for filling up our Uli Uli property have been checked, and it has been found that about 60,000 cubic metres have been paid for.

As we did not get a satisfactory explanation from you, we have put the matter before our attorneys, and have been advised that you would be responsible unless you could give satisfactory proof that a quantity of about 60,000 cubic metres was spread over the ground. As the total area is less than 20,000 square metres, the average of filling up—including a fair allowance for shrinkage—must exceed at least two metres and a half.

We therefore ask you to show to our representative, Mr. G. W. Cooke, Plaza Moraga, No. 7, which way the 60,000 cubic metres were disposed of, as we are in a position to prove that in a great many places the height of the sand does not reach one metre and sixty centimetres, you must be able to show places where at least double that quantity has been used.

If you cannot give those particulars within the next three days, that is, on or before the 1st of May, 1902, our attorneys are instructed to take up the case at once.

Yours truly,

BEHN, MEYER."

It will be seen from this letter that there had been a previous conversation or correspondence between the parties with reference to this work, and that the defendants in error were given an opportunity before the alleged delivery on the 12th of May to substantiate the measurements for which they had received pay. The defendants in error at the trial contended, as they had with reference to the house, that as the measurements had been supervised by the agent of the plaintiffs in error upon the ground and accepted, and paid for by the plaintiffs in error, they were not entitled to recover the excess amounts paid, even though it should appear that the measurements were incorrect. This view of the law was discarded by the trial Court, but sustained by the appellate Court, which held that the doctrine of estoppel applied, and that the plaintiffs in error here could not recover (R., p. 105). The appellate Court also found a state of facts which did not exist in the Record and which, instead of being proven, was absolutely disproved by the facts in the case, viz.:

"It was, before it was filled, a rough piece of land covered with very deep ditches."

This finding of fact by the appellate Court rests entirely upon the testimony of O. F. Campbell, Record, page 18, and the reverse was proven to be true, the Court copying the question asked the witness as a part of the answer. Nowhere in the Record does it appear from any fact testified to that the conclusion drawn by the appellate Court could be justified. The evidence on this point was so clear and

unmistakeable that it is surprising that the appellate Court should have fallen into such an error of fact.

Johann Menzi, Record, pages 56-7, testified that he was familiar with the appearance and topography of the land prior to the construction of the house and when the sand was placed on the land; that it was a zacate field, a grass field, and that it was an even grass field, divided into four parts.

> "Q. What do you mean by 'even?' Level?
> A. Level, yes.
> Q. What opportunities had you for knowing how that land did lay?
> A. Well, I have been in Manila six years and I passed there very often. I used to live in Nactajan, and had to pass there every day for about one year, and afterwards I passed sometimes." (R., p. 57.)

Mr. Dittmar, Record, page 78, testified as follows:

> "Q. Are you familiar with the topography of that land at the time you purchased it?
> "A. Yes, sir. * * *
> "Q. What was the topography of the land itself?
> "A. There were at first four squares of zacate fields, and on that property running parallel to the River Pasig there were seven to nine nipa buildings, nipa shacks.
> "Q. Aside from these mounds, which divided the tract into four zacate fields, were there any other irregularities in the topography?
> "A. No.
> "Q. Just state what sort of a field it was so that the Court can understand.
> "A. A zacate field must be almost level.
> "Q. State whether this one was or not.
> "A. Certainly; there were all four zacate fields.
> "Q. Have you been over the land?
> "A. Yes, several times.
> "Q. After you bought it?
> "A. After I bought it."

The testimony of the two witnesses referred to, as quoted above, proves the topography of the land to have been level earth and not filled with ditches, as found by the appellate Court. The testimony of these two witnesses stands unimpeached and uncontradicted; and having proven the land to be level, if, in order to establish beyond all doubt the correctness of the measurements which were made thereon, it were necessary to show further that the land itself was hard and firm and would not give or yield to the weight of sand which was afterwards placed upon it, this fact was established by the testimony of Major Case, Record, page 55, as follows:

> "Q. Do you believe that it was the former earth of a grass field?
> "A. Yes.
> "Q. On what do you base your opinion?
> "A. The filling was all of sand; the bottom under the sand is all of clay; the clay is there and it must have been there before the sand was put on, so I concluded that it was the original soil."

Mr. Robert M. Loper, who was shown to be an expert, on Record, page 70, testified as follows:

> "Q. When you went down the holes, will you state what kind of a soil you found down there—soft, hard or what?
> "A. The soil of the bottom of the hole was reasonably firm.
> "Q. Was it sand?
> "A. Very, very slightly mixed with sand. No more sand than you can find in soil."

Having established the land to be level, and the bottom to be of clay, it was a simple matter then for accurate measurements to be made as to the quantity of sand placed upon the lot of ground; and even though the bottom should have

been other than hard, it will be observed from the testimony, Record, page 70, that the line of demarkation was perfectly plain between the sand used in filling and the natural soil, and that accurate measurements were made by competent experts, whose testimony stands unimpeached and uncontradicted, and who found that it was impossible to have placed upon this soil any more than 20,965 metres. (Case's testimony, Record, page 46):

> "Having determined the area and the average approximate thickness of the filled area, the resultant cubic contents is obtained by multiplying one by the other, which gives the result of 20,965 cubic metres of filling in the property. These figures can be taken as approximately correct."

Robert M. Loper, an expert engineer, testified as follows, Record, page 64:

> * * * "The ascertained depth of this fill, or average thickness of the fill, showed that the amount of sand that had been deposited upon this property must have been 20,935.27 cubic metres deposited on the land of sand or fill."

Again, the same witness (same page) testified as follows:

> "Q. On the assumption, Mr. Loper, that that property was approximately level when the filling was put on there, are you certain that the quantity of sand which you testified the filling amounts to is all that was put on it?
>
> "A. Beyond a doubt. If the land was level, there can be no question as to the amount of filling that was put on there.
>
> "By the Court: How much filling did you say there was?
>
> "A. 20,935.27 cubic metres."

By this testimony it will be seen that the plaintiffs in error here were entitled to recover from the defendants in error the difference between the actual measurement and the amount paid for, which the trial Court found to be (Record, page 12), at least 40,000 cubic metres of sand, making in dollars and cents the aggregate sum of $52,000.00, Mexican currency. As against this abundant and convincing proof, it was, as heretofore stated, contended that the measurements of the agents of the plaintiffs in error, who were the only persons who were supposed to have measured the sand as it was delivered, were conclusive and that, having accepted and paid for the sand, the mistaken measurements could not be corrected, and the defendants in error in the trial court put upon the stand the agent who made the measurements, viz., George Ignacio Cercal, whose incapacity for such measurements was clearly proven upon cross-examination. (Record, pages 32-3.)

"Q. Where were you educated?
"A. In a German school.
"Q. How long did you go to school?
"A. Six years.
"Q. Did you study mathematics?
"A. I have studied how to read, write and make accounts.
"Q. How do you measure a cubic foot?
"A. I measure the height, the thickness, and the length.
"Q. How do you measure a cubic metre?
"A. In the same way as I explained.
"Q. Well, how did you measure the cubic contents of the banca?
"A. I only measured the water line of the banca."

* * * * * * * *

"Q. How much would a banca contain that was three metres long, two metres wide, and one metre deep; how much does that contain?
"A. Four cubic metres."

From this answer it will be seen that the incompetency of the witness, who was the agent measuring the sand, is proven, as the correct answer would be to the question propounded—six cubic metres.

Again, the incompetency of the same witness to measure sand is proven, Record, page 33:

> "Q. How many cubic metres would a banca hold that was three metres fifty long, one metre fifty broad, and fifty centimetres deep?
> "A. Five and a half."

The correct answer to this question is 2.62½ cubic metres. This witness was the agent or employee in charge of the work a portion of the time, doing all the measuring for both the defendants in error and the plaintiffs in error. That this witness did all of the measuring is proven by the testimony of the defendant in error O. F. Campbell, Record, page 26, which is as follows:

> "Q. Now, Mr. Campbell, you stated that the sand that you put on the Behn, Meyer & Co. property was measured by the representative of Behn, Meyer & Co. Did anybody representing you measure it?
> "A. My man merely was there to see that the filling went on and to receive the receipts from Behn, Meyer's representative."

Again, the same witness, Record, page 27, testified as follows:

> "Q. You stated awhile ago, Mr. Campbell, I understood you, that your representative didn't measure the sand delivered. Is that correct?
> "A. It was not measured actually by any man, but the two men were there together. It was in charge of Behn, Meyer & Co.'s man."

With these facts before the trial Court, which had an opportunity to observe the witnesses who were testifying and their conduct while so doing, it is not surprising that the trial Court, in its opinion, Record, page 11, should have found:

> "The plaintiffs attempted to rebut this evidence by three or four witnesses. Taking them together, their manner of testifying, their intelligence, and their apparent knowledge of the matters about which they spoke, their evidence was without much weight. One of these witnesses, Vicente Pastor, who claimed to be a civil engineer, showed himself to be what is known in the books as a swift witness, and did not impress the Court as an expert, nor did he show that he had made such observations, measurements, and calculations as would entitle his evidence to much weight."

It will be observed from the reading of the testimony that Vicente Pastor was the star witness for the plaintiffs in error at the trial Court and the one upon whose testimony they largely relied. And yet, the Court finds him to be a swift witness and incapable of correctly testifying about the matters in controversy. The appellate Court, without the opportunity of observing the witnesses, their conduct and their intelligence, reversed all the findings of fact of the trial court, and they did so under mistaken impressions as to both the law and the weight of the evidence.

And the observation of the court on the witness Pastor, just quoted, clearly eliminates him from the case, upon the familiar principle that the decision of the trial court on the point whether a witness be an expert will be deemed conclusive unless clearly shown to be erroneous.

> The Stillwell & Bierce Mfg. Co. v. Phelps, 130 U. S., 520.
> Perkins v. Stickney, 132 Mass., 217.
> Marston v. Dingley, 88 Me., 546.
> N. J. Zinc Co. v. Lehigh Zinc Co., 59 N. J. L., 189.
> Stevens v. Minneapolis, 42 Minn., 136.

Attention is also called to the following language of the trial Court, Record, page 11:

> "To my mind it is conclusively shown that not more than 21,000 cubic metres of filling were placed by the plaintiff on this lot. This is corroborated in part by the latter part of the filling contract, which appears in the records as plaintiff's Exhibit B, on page 30, which reads: 'Amount to be furnished will be over 15,000 cubic metres.' This indicates to me that it was in the mind of the contracting parties at the time that the amount of filling would not be very far in excess of 15,000 cubic metres."

Conclusion.

It thus abundantly appears that the Court below plainly erred respecting each of the two propositions of law applied by it to the case, namely, first, as to the effect of taking possession of the building; secondly, as to the right to recover money paid by mistake; and, also, in overturning the findings of fact by the trial Court.

On the first proposition of law, the Court held, against practically all the authorities, that the mere fact of accepting the house and occupying it involved an acknowledgment that it was constructed substantially as required by the contract, plans and specifications; whereas it is the law that acceptance, to have such effect, must be under circumstances which, in addition to the mere act of taking possession, indicate such taking to be in such knowledge of, acquiescence in, and intention to submit to existing defective work and materials; and the facts of the case clearly show that the acceptance was practically forced upon the plaintiffs in error and was wholly unaccompanied by any such circumstances as those indicated.

On the second proposition of law, the Court erred also equally against practically all, if not all, the authorities, that money paid under a mistake can not be recovered unless the mistake were mutual or accompanied by some elements of fraud or deceit; whereas the law is that all that is necessary to entitle one paying money under a mistake to recover it back is to show that it was received under circumstances making it against conscience for the recipient to hold it, no matter what the character of the ignorance, or the extent of the carelessness, of him making the payment.

And, thirdly, as to the facts, the testimony clearly shows that, as found by the trial Court, the work on the house failed to meet the contract requirements, or the requirements of proper workmanship and character of materials, to the extent at least of the unpaid balance of the money payable had the work and materials been proper in character; and that as to the filling of the lot the measurements clearly established the excess for which the plaintiffs in error were charged and paid.

Since the decision of the case at bar by the Supreme Court of the Philippines, this Court has decided the case of De La Rama v. De La Rama, 201 U. S., 303, holding that, even where there was a literal compliance with the provision of Section 497 of the Philippines Code of Civil Procedure, empowering the Supreme Court of the Islands to review the evidence in a case, that Court should not reverse the findings of fact of the court of first instance, unless such findings were plainly and manifestly against the weight of the evidence; and, in the De La Rama case, this Court reversed the Supreme Court of the Philippines, because it had set aside findings of fact of the lower court upon an insufficient showing that they were so against the weight of the evidence, and, accordingly, remanded the case with the necessary result of reinstating the conclusion and judgment of the court of first instance. This case is directly applicable

to the case at bar and should rule it. As already shown, the court of first instance had before it the witnesses, a fact to which reference is made in its opinion, and it passed upon the evidence in the light of the character, appearance and bearing of the witnesses, as well as upon a careful analysis of the evidence itself. And the findings of that court are not so plainly and manifestly against the weight of the evidence as to have justified the Supreme Court of the Philippines in its decision; on the contrary, a just and simple consideration of the evidence can properly lead to no other conclusion than that the court of first instance was right.

The seventh assignment of error is based upon matter not appearing in the Record, but matter of statutory law.

The Record shows that the judgment in favor of the plaintiffs in error was rendered on July 8, 1903, for the sum of fifty-two thousand dollars, Mexican. At that time, what was known as Mexican currency was legal tender in the Islands and was, in fact, the money of the country.

On January 27, 1904, by act numbered 1045 of the Philippines Commission, it was provided that all judgments thereafter should be in Philippine pesos, which is the new money of the country and legal tender. The judgment of the Supreme Court of the Philippines reversing the judgment of the court of first instance was rendered on April 2, 1904, more than two months after the passage of the act mentioned, and was for the sum of nine thousand, two hundred and fifty dollars and sixty-two cents, Mexican, instead of being that, or any other amount, in Philippine pesos.

Although no objection to the form of the judgment was noted, or exception taken thereto, the defect in the judgment is so radical that it cannot stand, and, if for no other reason, the judgment should be reversed, as plainly unwarranted by law.

The judgment of the Court below should, therefore, be reversed, and the cause remanded to that Court with directions to reverse its judgment and affirm the judgment of the trial Court.

Respectfully submitted,

CHARLES C. CARLIN,

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Attorneys for Plaintiffs in Error.

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IN THE

Supreme Court of the United States

October Term, 1906.

No. 227.

BEHN, MEYER & COMPANY, *Plaintiffs in Error.*

vs.

CAMPBELL & GO-TAUCO.

MEMORANDUM IN REPLY IN BEHALF OF THE PLAINTIFFS IN ERROR.

HENRY E. DAVIS,
For the Plaintiffs in Error.

IN THE

Supreme Court of the United States

October Term, 1906.

No. 227.

BEHN, MEYER & COMPANY, *Plaintiffs in Error.*

vs.

CAMPBELL & GO-TAUCO.

APPEAL FROM THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

MEMORANDUM IN REPLY IN BEHALF OF THE PLAINTIFFS IN ERROR.

It is contended in behalf of the defendants in error, in seeming seriousness, that the plaintiffs in error are bound as to the measurements of the quantity of sand used in filling the lot belonging to the plaintiffs in error by Section 1598 of the Philippines Civil Code and the rulings of this Court to the effect that, where parties to a contract have agreed upon some third person to determine the amount of labor done or materials furnished under a contract, the determination of such third person as to quantities and amounts is conclusive on the parties in the ab-

sence of fraud or of such gross error as to imply bad faith.

The principle invoked is readily conceded, but that it has no application to the case at bar is plain, upon the most cursory view of the facts.

The Section of the Civil Code relied on merely provides for the application to a given case of the principle, which is as follows: Where parties to a contract for given work stipulate in the contract that payments are to be made on the certificate of a third person, whose determination as to quantities and amounts shall be conclusive, the parties will be held bound by such provision of the contract, in the absence of fraud, or of such gross error as to imply bad faith. This principle has received the repeated sanction of this court, and, in a proper case, is conclusive of any controversy between parties to a contract.

But this case does not call for, or admit of, the application of this principle. The contract between the parties (Rec. 7-8, 97) provides as to the measurement of the sand, as follows:

> "Material will be measured in whatever way the said Campbell & Go-Tauco, with the approval of Behn, Meyer & Company, deem most expedient."

The contract will be read in vain to discover therein the designation of any third person by whose measurements the parties, or either of them, agree to be bound; and the testimony shows that there was no such third person.

Campbell, one of the defendants in error, speaking of the manner in which the quantity of sand used was arrived at, testifies as follows (Rec. 17, 18):

> "A. The receipts were given daily, and, at the end of each week, we rendered duplicate bills which were O.K'd by the manager of the firm, and then presented for payment weekly.

"Q. Who gave these receipts daily, as stated by you?

"A. An authorized representative of Behn, Meyer & Co.

"Q. And was this authorized representative of Behn, Meyer & Company there all the time to receive the same?

"A. Constantly; in fact he lived there on the ground.

"Q. Were you paid by Behn, Meyer & Company for furnishing these 62,000 cubic meters of sand?

"A. We were paid all except the last four receipts, which they have not as yet paid.

"Q. You were always paid according to the amount of the receipts, were you not?

"A. I was always paid—made my bills—from the receipts given to me during the week.

"Q. Before payment, would they examine the bills or receipts, or any other papers?

"A. I always furnished the receipts with the bills, and they looked over the receipts, and they had also there another book which they always went over, and the two books always correspond—at least the receipts and their books were the same. In case there was any discrepancy in the matter of one-tenth of a meter, it was always arranged right at that moment before the bill was O. K'd by the manager.

"By the Court:

"Q. Whose book is that you are talking about?

"A. The book of their authorized representative to receive the same.

"Q. The man on the ground?

"A. The man on the ground. And each week he turned in his book before I rendered my bills."

On cross-examination, this witness testified as follows (Rec. 26-7):

"Q. . . . Now, Mr. Campbell, you stated that the sand that you put on the Behn, Meyer & Company property was measured by the representative of Behn, Meyer & Company. Did anybody representing you measure it?

"A. My man merely was there to see that the filling went on and to receive the receipts from Behn, Meyer's representative.

"Q. You had a man there as well as Behn, Meyer & Company?

"A. Yes, sir.

. . . . . .

"Q. You stated a while ago, Mr. Campbell, I understood you, that your representatives didn't measure the sand delivered, is that correct?

"A. It was not measured actually by my man, but the two men were there together. It was in charge of Behn, Meyer & Company's man.

"Q. This letter of yours, which you say is a copy of a letter written to Mr. Cook, is dated April 30, 1892. That was about more than a year closer to the time than we are now. You say there the material was measured as taken from the banca, a representative of Behn, Meyer & Company being present and checking it as delivered. Who did the measuring when Behn, Meyer & Company was there?

"A. The laborers really did the measuring, but Behn, Meyer & Company's man oversaw the work and received it, or not, as he wished.

"Q. Wasn't your man there to represent you?

"A. Yes, sir.

The witness Dittmar, manager of the plaintiffs in error, having been called on behalf of the defendants in error, testified as follows (Rec. pp. 28, 29):

"Q. Did you also bring with you, Mr. Dittmar, the memorandum book kept by your representative on that work of the sand received by him on the ground?

"A. I understand there were only loose receipts given, and they were entered afterwards in our office in the book here.

"Q. Whenever you made a payment for this sand, would you make an entry in this book?

"A. No; the entries into the big book are made either from the cash book or from the cheque book.

"Q. Then, this is a ledger, is it not?

"A. No, it is an account current.

"Q. Did you bring with you the book that showed the above payments made by you on the sand?

"A. Yes, sir, that big book contains everything.

. . . .

"Q. As the manager of Behn, Meyer & Company, did you at any time personally pay, or direct your subordinates in the office to pay, any bills for sand?

"A. Yes, sir; I did.

"Q. Before paying any bill, what books would you refer to?

"A. No books, only the receipts.

"Q. What receipts?

"A. Receipts signed by the man employed by me.

"Q. Have you these receipts sent to you by your employe?

"A. Yes, sir; he brought them over himself.

"Q. Well, have you got some of them now?

"A. Yes, they are lying there.

"Q. Who gave this book to you?

"A. I had it in the office, but I could not say who wrote it.

"Q. Why did you have this book in your office?

"A. Well, he put down according to the receipts that he had receipted for and afterwards brought the book to our office."

The witness Cercal, called by the defendants in error, testified as follows (Rec. 31-2):

"Q. Were you at any time employed by Behn, Meyer & Co.?

"A. I was employed by them.

"Q. What position did you hold in that firm?

"A. To note down in the book the sand received.

"Q. Where is that book in which you noted down the sand received on that ground?

"A. I delivered the book in the office of Behn, Meyer & Company.

"Q. I now hand you two books, and please state if either one is the book that you referred to.

"A. I commenced to make my entries on Folio 145 of this book, under the date of October 11, 1901, and the last entry made by me is at Folio 121 of another book, which is dated February 7th.

"Q. Who relieved you of this job?

"A. I don't know, because when I left there I became sick and went to the hospital.

"Q. Were you also acquainted with the man who was employed there before you?

"A. Yes, I know him by sight only, but I don't know his name.

"Q. By whose instruction did you make the entries in the book of the sand delivered?

"A. By order of Mr. Cottoncamp, and later by order of Mr. Dittmar.

. . . .

"Q. During the time you were employed there, or, in other words, during the time you kept these books in question, did you know every cubic foot of sand that you received on the ground?

"A. Yes."

The incompetency of this witness to make such measurements as were involved clearly appears from his cross-examination, and is exposed in the main brief for the plaintiffs in error, pp. 38-9; and, in passing, it may be remarked that, while this witness was the employe of the plaintiffs in error, defendants below, and was called by the defendants in error, plaintiffs below, and did not know more as respects measuring the sand than is disclosed by the foregoing extracts from his testimony, the Supreme Court below, in reversing the court of first instance, in its opinion uses this remarkable language (Rec. 102, folio 152, 103 Folio 153):

"The sand was *measured* in bancas by the agent or servant selected and paid by the defendants. . . . The defendants did not call as witnesses any of their own agents or servants, who measured this sand at the time of delivery."

How far short the record thus is of establishing an agreement by the parties upon any third person, whose determination should be conclusive upon them, is obvious, as also is the utter absence of warrant for the statement in the brief for the defendants in error (page 44).

"In the case at bar, where the persons who measured the material were appointed by the plaintiffs in error, were in their employ, and followed the method of measurement designated by them, the rule, as above stated, surely applies with the greatest force."

Respectfully submitted,

HENRY E. DAVIS,

For Plaintiffs in Error.

FILE COPY.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

Office Supreme Court, U.
FILED
MAR 1 1907
JAMES H. McKENNEY

No. 227.

BEHN, MEYER & COMPANY, PLAINTIFFS IN ERROR,

vs.

CAMPBELL & GO-TAUCO.

IN ERROR TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

BRIEF FOR DEFENDANTS IN ERROR.

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BRIEF FOR DEFENDANTS IN ERROR.

Statement.

This case is brought here by writ of error to review a judgment of the Supreme Court of the Philippine Islands in favor of Campbell & Go-Tauco, plaintiffs below and defendants in error here, in the sum of $9,250.62, Mexican currency, and costs (Rec., 96-105).

The action was begun in the Court of First Instance of the City of Manila, the plaintiffs, Campbell & Go-Tauco, partners and contracting builders, seeking to recover a balance of $9,250.62 claimed to be due them for work done and materials furnished under a contract between them and Behn,

Meyer & Company for the construction of a dwelling-house in the city of Manila.

The complaint (Rec., 1) in substance alleges:

That on the 20th day of June, 1901, the plaintiffs contracted in writing with defendants (*a*) to build a dwelling-house on land of said defendants on the Pasig river near Malacañan palace, in Manila, as per plans and specifications attached to the contract, for the sum of 13,000 pesos, to be paid as follows, viz: "4,000 pesos when the necessary materials are on the ground and work commenced; 4,000 pesos when the house is finished with walls, roof, etc.; 5,000 pesos on the completion of the work, which will be completed within three months;" (*b*) to install a water system to stable, kitchen, baths and water-closets, and rain-tubes from the same, for the sum of 500 pesos, and (*c*) to construct a stable according to specifications for the sum of 1,500 pesos, payment upon completion.

The complaint further alleges that plaintiffs have fulfilled their part of the contract; that any delay in its completion was due to changes, alterations, and modifications ordered and contracted for by defendants, and that there is due and owing to plaintiffs from defendants a balance of 1,000 pesos for work done under the contract on the dwelling-house and 500 on account of the installation of the water system etc. (complaint, par. IV, Rec., 2).

Plaintiffs further claim 5,417.50 pesos for alterations and additions to the work provided for in the original contract, consisting of an addition to the house, paving, and ceiling, all authorized and contracted for by defendants (complaint, pars. V and VI, Rec., 2), and $2,333.12 is claimed on account of further specified alterations, changes, and modifications made at defendants' request, thus bringing the total claim up to 9,250.62 pesos (complaint, par. VIII).

Defendants in their answer (Rec., 3-6) admit the making of the contract set up in the complaint and the subsequent agreement covering the addition to the house and the

paving, amounting to 4,000 and 305 pesos respectively, but deny that the work on ceiling, 1,112.50 pesos, and the items mentioned in paragraph VIII of the complaint, amounting to $2,332.12, were authorized by them. Defendants disclaimed any liability under the contract, and, by way of counter-claim, set up a claim of $30,000 Mexican for damages sustained by reason of faulty construction of the house, and a further counter-claim of $41,197.63 Mexican on account of an alleged overpayment on a contract for the filling of a certain lot on the bank of the Pasig river with earth and sand.

Answering to this counter-claim, plaintiffs denied both items, and set up that under the contract for filling the lot there was an unpaid balance of $2,279.55 Mexican still due them, for which they also prayed judgment (Rec., 8).

Subsequently defendants filed an amended answer (Rec., 9), cutting down their counter-claim for damages from faulty construction from $30,000 to $13,000 Mexican, and increasing their counter-claim for overpayment on the filling contract from $41,197.63 to $54,275 (Rec., 9).

The contract for the construction of the dwelling-house and stable (Plaintiffs' Exhibit A, Rec., 3) is as follows:

"MANILA, P. I., *June* 20, 1901.

"Messrs. Campbell & Go Taoco likewise agreed to construct for Messrs. Behn, Meyer & Co. a dwelling-house upon the property referred to, for the sum of thirteen thousand pesos Mexican, in accordance with the annexed plan and specifications. Upon this property there shall be made to Messrs. Campbell & Go Taoco three payments: Four thousand when the necessary materials shall have been placed upon the ground and the work shall have been begun; four thousand pesos when the house is finished, with its walls, roof, etc.; and five thousand pesos upon the completion of the work, which must be within three months.

"For the installation of drinking water in the stables, kitchen, baths, kitchen, and water-closets, and

the drainage necessary for the same, we agree to pay five hundred pesos.

"For the erection of a stable in accordance with the conditions as set forth, fifteen hundred (1500) pesos Mexican, payable upon the completion of the work. Accepted.

"*Per pro* BEHN, MEYER & Co.
"(Signed) J. KATENKAMP.
"(Signed) O. F. CAMPBELL.
"(Signed) G. C. TOACO."

The following are the specifications for the construction of the house (Defendants' Exhibit A2, Rec., 6):

"Statement of terms and conditions governing the construction of a house of strong materials upon certain premises situated on Calle Malacañan, district of San Miguel, its owners being Behn, Meyer & Co.

"1. The house shall have a frontage of 24 yards by 20 in depth and 7½ in height.

"2. The foundations shall be of ordinary stone of Guadalupe, and shall be 100 m. by 100 m. in depth, with piers 1.00 m. by 0.60 m. wide. The masonry of the lower story shall be of that class of stone ordinarily called Guadalupe 0.16 m.

"3. The stanchions or supports shall be made of Apitong, Macasim, or Amoguís wood, with scantlings 0.20 by 0.20 m. The framework, roof, cross-beams, angle rafters, sockets, king-posts, props, and partition framework shall be constructed of Apitong, Macasim, or Amoguís; the scantlings of the props shall be 0.12 m. by 0.07 m.

"4. The partitions of the principal story or floor shall be of boards made of the above-mentioned wood ½ inch thick. The boards for the floor of the principal story shall be all of Amoguís or Tagili.

"5. The windows shall be of shells of the country. The doors of the rooms of the principal story and the outhouses of the ground floor shall be of Macasim or Apitong, and the balconies of the gallery shall be of wood of a like class.

"6. The principal staircase shall have a width of 1.40 m., with banisters and balustrades 0.05 m. by 0.05 m., and another servants' staircase 0.05 m., wide and made of second-class wood.

"7. The painting of the entire exterior shall be in oil and the entire interior of whiting, except the doors, which shall be varnished.

"Manila, June 30, 1901.

"(Signed) CAMPBELL & GO TOA."

The contract for the filling of the lot on the Pasig river, of even date with that for the construction of the house, is as follows (Defendants' Exhibit D, Rec., 7):

"MANILA, P. I., *June* 20, 1901.

"We, Campbell & Go-Tauco hereby agree to and with Behn, Meyer & Company, city of Manila, upon their signed acceptance, to fill up a certain lot lying on the bank of the Pasig river, next to Malacañan palace, with a suitable filling composed of earth and sand of good quality, at the rate of one dollar and thirty cents ($1.30) Mexican currency, per cubic meter. Material will be measured in whatever way the said Campbell & Go-Tauco, with the approval of Behn, Meyer & Co., deem most expedient, then spread evenly over the ground to bring the lot to a certain level, which level will be determined by Behn, Meyer & Co. The amount to be furnished will be over fifteen thousand (15,000) cubic meters, and delivered at the rate of five thousand cubic meters monthly, unless some unforeseen cause, as storms, etc., make it impossible. Accepted.

"(S'g'd) BEHN, MEYER & Co.
" GO-TAUCO,
" O. F. CAMPBELL,
Contractors."

On trial before the Court of First Instance that court found in favor of defendants, dismissing the complaint and entering judgment for defendants in the sum of $52,000 Mexican on their claim for overpayment on the filling contract (Rec., 9-12).

The case coming before the Supreme Court of the Islands, the judgment of the lower court was reversed "and judgment ordered for the plaintiffs for the sum of $9,250.62 Mexican currency, with costs of both instances" (Rec., 96-105).

From this judgment of the Supreme Court of the Philippines the defendants, Behn, Meyer & Company, prayed an appeal to this court, which was allowed April 30, 1904 (Rec., 106).

The cause (No. 107, October term, 1905), coming before this court, was dismissed at the last term for want of jurisdiction (200 U. S., 611).

Immediately thereafter defendants, Behn, Meyer & Company, sued out the writ of error (Rec., 112) which brings the cause before this court for a second time.

I.

The scope of review upon this writ is limited to questions of law; the findings of the Supreme Court of the Philippine Islands as to matters of fact are conclusive and are not here open to review.

When this cause was before this court at the last term, on appeal, it was argued in behalf of appellees that the case should be dismissed:

> "Because this case is an action at law, and under the provisions of section 10 of the act of July 1, 1902 (32 Stat., 691, 695), conferring appellate jurisdiction on this court over the Supreme Court of the Philippine Islands, should have been brought up by writ of error and not by appeal."

And the case of *Deland vs. Platte County,* 155 U. S., 221; *Walker vs. Dreville,* 12 Wall., 440, 442, and other cases holding that final judgments in cases at law could only be reviewed upon writ of error, were cited in support of this position.

This view of the case was taken by this court, as appears from the *per curiam* opinion (200 U. S., 611), as follows:

> "Dismissed for want of jurisdiction. Act July 1, 1902, 32 Stat., 691, c. 1396, sec. 10; *Deland v. Platte County,* 155 U. S., 221; *Comstock v. Eagleton,* 196 U. S., 99; *Oklahoma City vs. McMaster,* 196 U. S., 529; *Walker v. Dreville,* 12 Wall., 440."

Although it was thus held that this court would not entertain jurisdiction of the case to review the judgment below on both law *and facts* by way of appeal, precisely the same scope of review—on *facts* as well as law—is now sought by way of writ of error. Plaintiffs in error again question the correctness of the findings of the court below on matters of fact and seek review of those findings of fact on this writ of error. They ask this court to examine the evidence and to determine whether or not it supports the findings of fact made by the court below. In other words, under the guise of a writ of error, they now seek to open up the whole case just as if it were again before the court on appeal, thus disregarding the fundamental difference between appeal and writ of error and asking the court to do what it so plainly declined to do—examine the whole case upon the evidence.

That the whole burden of complaint of these plaintiffs in error is that the Supreme Court of the Philippines misinterpreted the evidence and based erroneous findings and judgment thereon is apparent from their assignment of errors (Rec., 110).

This case involves two distinct claims or matters of suit—(1) a claim for $9,250.62, Mexican currency, for work done and materials furnished by plaintiffs in the construction of a certain dwelling-house for defendants, to which defendants (plaintiffs in error here) opposed a counter-claim for damages for faulty construction of the house, in the sum of $13,000, Mexican; and (2) a second counter-claim, amounting to $54,275, Mexican, for alleged overpayment by

defendants to plaintiffs on account of the filling of a certain lot with sand and earth. Thus the court below had two general questions of fact before it for determination:

(1) As to the construction of the dwelling-house—whether plaintiffs had done the labor and furnished the materials claimed, and whether or not the house was properly constructed; and

(2) As to the filling of the lot—whether or not there was an overpayment on account of the earth and sand delivered.

As to the construction of the dwelling-house, the court below, in its opinion, made the following specific findings (Rec., 100):

> "From the evidence in this case, it must be found as conclusions of fact:
>
> "1. That in the construction of the building the contract, plans, and specifications have been complied with, with the exception of a variation to the advantage of the owner, which is that the principal posts rests upon layers of stone, instead of upon the ground, as called for by the plan.
>
> "2. That if there has been any variation from the original plan, this was done largely, if not wholly, with the consent of the owner, and, at all events, with that of his agent, the inspecting engineer, and that these changes have been improvements.
>
> "3. That the house was constructed under a contract and specifications which did little more than to designate the size of the building, the material to be employed, and, with the plan, gave a drawing of the building, leaving the details necessarily almost completely to the direction of the inspecting architect or engineer.
>
> "4. That the owner entrusted the direction of the work to an inspecting engineer selected by himself, with full authority to represent him, and that the contractor has performed the work solely in accordance with the direction of the said inspecting engineer.

"5. That although there is some evidence to indicate that a part of the house has settled more than other parts, this is due either to the ground itself or to a defect in plan, or to the directions of the inspecting engineer, and cannot be attributed to a failure on the part of the contractor to comply with the conditions of the contract.

"6. If there are any cracks in the floor and in the joints in the building, this is due to the class of lumber which was selected by the owner.

"7. That the plan of the work and the placing of the principal posts were approved by the city engineer and were in conformity with the ordinances.

"8. That the owner took possession of the house in the month of May, 1902, and has occupied it since that time as a dwelling-house."

And upon these facts, so found, the court gave judgment for the plaintiff as follows (Rec., 101):

"It follows that inasmuch as the plaintiffs complied with their contract and constructed the house according to the plans and specifications and under the directions of the defendants or their authorized agents, they are entitled to recover therefor the unpaid balance as found by the court below, viz., $9,250.62, Mexican currency."

The third assignment of error (Rec., 110) sets forth that the Supreme Court of the Philippine Islands erred in finding the foregoing as matters of fact.

As to the filling of the lot and the quantity of earth and sand delivered for that purpose, the Supreme Court of the Philippines made no specific finding of facts, the court saying after a review of the evidence on this point (Rec., 103):

"The evidence, therefore, is uncertain and does not enable us to accurately determine the exact number of cubic feet of sand or earth delivered on the lot; and this is especially true when the evidence shows that the conclusions of the defendants' experts are disputed by two experts called by the plaintiff, experts

> of larger experience than those of the defendants and equally as competent to give opinions on this question."

The court did, however, find (Rec., 102) that:

> "The defendants, by their own books and receipts, and as measured by their own agents or servants, showed that they received and paid for 62,690.50 meters of sand and earth."

And also (Rec., 104) that:

> "There is no proof that any fraud or deceit was practiced on the defendants in the matter of measurements or in the keeping of the accounts thereof."

And again (Rec., 105) that:

> "No fraud or deceit is proved, and no mutual mistake is shown by unmistakable evidence."

The court then applied the law of the case, saying (Rec., 105):

> "This case, in the absence of evidence of a mutual mistake, is governed by the doctrine of estoppel. The defendants measured the sand, they receipted for it, and they paid for it. They cannot now say that they did not receive it."

And thereupon the court gave judgment against the defendants on their counter-claim as follows (Rec., 105):

> "It follows that the defendants are not entitled to recover from the plaintiffs the said sum of $52,000, Mexican currency, allowed by the court below."

Now, it is settled law that this court will not review on writ of error questions of fact. Even in cases of equity or admiralty jurisdiction, when before the act of March 3, 1803, they were brought up on writ of error from the circuit or district courts, this court would not examine into the facts although the evidence was also transmitted. "If such

causes are removed with a statement of facts, and also with the evidence, still the statement is conclusive, as to all the facts contained in it."

Wiscart vs. Dauchy, 3 Dall., 324.

Indeed, this court has always been inhibited by the Judiciary Acts from reversing any judgment upon writ of error "for any error in fact."

Act of September 24, 1789, Sec. 22 (1 Stats., 73).
Act of March 2, 1803 (2 Stats., 244).
Act of February 18, 1875 (18 Stats., 318).

Section 1011 of the Revised Statutes provides:

> "There shall be no reversal in the Supreme Court or in a circuit court upon a writ of error, for error in ruling any plea in abatement, other than a plea to the jurisdiction of the court, *or for any error in fact.*"
>
> *Miles vs. United States,* 103 U. S., 304, 313.

As said by this court in *Martinton vs. Fairbanks,* 112 U. S., 670, 672:

> "The provision of section 1011, Revised Statutes, continues in force and forbids a reversal of the judgment of the circuit court for any error of fact. Upon the issues of fact raised by the pleadings in this case there was a general finding for the plaintiff. The defendant contends that the evidence submitted to the court did not justify this general finding. But, if the finding depends upon the weighing of conflicting evidence, it was a decision on the facts, the revision of which is forbidden to this court by section 1011. If the question was whether all the evidence was sufficient in law to warrant a finding for the plaintiff, he should have presented that question by a request for a definite ruling upon that point."
>
> * * * * * * *
>
> (Page 673.) "The proposition that the general finding of the court in this case is open to review is

in direct opposition to the rulings of the court in the cases cited. The plaintiff in error seeks to make the question whether the evidence set out in the bill of exceptions justified the finding by the court for the plaintiff of the issue of fact raised by the pleadings. This is, in defiance of the decision of this court that it cannot be done, an attempt upon a general finding to bring up the whole testimony for review by a bill of exceptions.

"The theory of the plaintiff in error seems to be that the general finding in this case, like a general verdict, includes questions of both law and fact, and that, by excepting to the general finding, he excepts to such conclusions of law as the general finding implies. But section 649, Revised Statutes, provides that the finding of the court, whether general or special, shall have the same effect as the verdict of a jury. The general verdict of a jury concludes mixed questions of law and fact, except so far as they may be saved by some exception which the party has taken to the ruling of the court upon a question of law."

Where, as under the provisions of the act of March 3, 1865 (13 Stats., 501), a cause is tried by the court without the intervention of the jury, the findings of the court below, whether general or special, are given the same effect as the verdict of a jury. When the finding of the court is special, "the review may extend to the determination of the sufficiency of the facts found to support the judgment."

Section 649, Revised Statutes, provides:

"Issues of fact in civil cases in any circuit court may be tried and determined by the court, without the intervention of a jury, whenever the parties, or their attorneys of record, file with the clerk a stipulation in writing waiving a jury. The finding of the court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury."

Section 700, Revised Statutes, is as follows:

"When an issue of fact in any civil cause in a circuit court is tried and determined by the court

> without the intervention of a jury, according to section six hundred and forty-nine, the rulings of the court in the progress of the trial of the cause, if excepted to at the time, and duly presented by a bill of exceptions, may be reviewed by the Supreme Court upon a writ of error or upon appeal; and when the finding is special the review may extend to the determination of the sufficiency of the facts found to support the judgment."

Where the record discloses no finding of facts and the court below has jurisdiction, there are no questions open to review by this court.

Floyd vs. McWilliams, 137 U. S., 576.

A special finding is thus defined by the court in *Norris vs. Jackson*, 9 Wall., 125, 127, as—

> "Not a mere report of the evidence, but *a statement of the ultimate facts on which the law of the case must determine the rights of the parties;* a finding of the propositions of fact which the evidence establishes, and not the evidence on which those ultimate facts are supposed to rest.
>
> * * * * * * *
>
> "In the case of a special verdict, the question is presented, as it would be if tried by a jury, whether the facts thus found required a judgment for plaintiff or defendant; and this being matter of law, the ruling of the court on it can be reviewed in this court on that record."

If a party desire to have the findings reviewed, he must have the court find the facts specially.

Coddington vs. Richardson, 10 Wall., 516.

Parties desiring a review of the law involved in the case must either get the court to make special findings or must present to the court their propositions of law and require a ruling on them.

Norris vs. Jackson, 9 Wall., 125.

Insurance Company vs. Sea, 21 Wall., 160.

The findings of the court below are conclusive if there be any evidence to support them.

Grayson vs. Lynch, 163 U. S., 468, 476.

See also—

Graham vs. Bayne, 18 How., 60, 62.
Insurance Company vs. Tweed, 7 Wall., 44.
Generes vs. Campbell, 11 Wall., 193, 199.
Insurance Company vs. Folsom, 18 Wall., 237, 248.
Lehnen vs. Dickson, 148 U. S., 71.
St. Louis vs. Western Union Telegraph Co., 166 U. S., 388.

Any inquiry into the facts of this case is hence clearly outside the scope of this review. The findings of the Supreme Court of the Philippines (Rec., 100) as to the construction of the house, its conformity to the plans and specifications and the directions of defendants' architect, and the work done and materials supplied, are all conclusive here. The facts so found are not now open to question. The only question now open for review and determination is whether, upon the facts so found, the court below was justified in point of law in awarding judgment in plaintiffs' favor for the amount of the unpaid balance. In other words, whether the "ultimate facts" thus found require or support a judgment for the plaintiffs. There being no question as to the amount of this unpaid balance—$9,250.62, Mexican—and the court below having found that "the plaintiffs complied with their contract and constructed the house according to the plans and specifications and under the directions of the defendants or their authorized agents," we think the correctness in point of law of entering judgment in plaintiffs' favor can hardly be questioned.

And as to the filling of the lot and defendants' counterclaim for the alleged overpayment, while the court below has not so formally stated its findings of fact as it has done in

the matter of the construction of the house and defendants' first counter-claim, we will nevertheless concede to the statements contained in the opinion, as to the ultimate facts in this matter, the force and effect of special findings of fact; otherwise any review on the matter of this second counter-claim is precluded.

Norris vs. Jackson, 9 Wall., 125.
Coddington vs. Richardson, 10 Wall., 516.
Insurance Company vs. Sea, 21 Wall., 160.

We have, then, these special findings by the court below:

(Rec., 102:) "The defendants, by their own books and receipts, and as measured by their own agents or servants, showed that they received and paid for 62,690.50 meters of sand and earth."

* * * * * * *

(Rec., 104:) "There is no proof that any fraud or deceit was practiced on the defendants in the matter of measurements or in the keeping of the accounts thereof."

* * * * * * *

(Rec., 105:) "No fraud or deceit is proved, and no mutual mistake shown by unmistakable evidence."

The defendants having received, receipted, and paid for the 62,690.50 meters of sand and earth, as measured by their own agents, and there being no evidence that fraud or deceit was practiced on defendants, either in the matter of making the measurements or of keeping the accounts thereof, and no mutual mistake having been proved, it seems to us the court below was clearly right in ruling as it did, that defendants were estopped from denying or avoiding their receipts and could not recover back the money paid. That such is the law has been very clearly ruled by this court in the case of *Chicago & Santa Fé Railroad vs. Price,* 138 U. S., 185, and in many other cases which we shall hereafter cite.

II.

The house being constructed in compliance with the plans and specifications and under the direction of appellants' authorized agents, defendants in error, are entitled to recover the unpaid balance of $9,250.62 Mexican.

Assuming, however, for the argument that this court could review the evidence and find the facts, without regard to the findings already made, and passing to a consideration of the merits of the cause, we respectfully submit that the court below committed no error, either of law *or fact,* in awarding judgment in favor of plaintiffs (defendants in error here) for the balance of $9,250.62 due on account of the construction of the dwelling-house and plumbing, and in setting aside the judgment of $52,000 for defendants entered by the Court of First Instance on their claim for overpayment on the filling contract.

Taking up first the original claim for work done and material furnished in the construction of the house, we find from the evidence that any defects existing in the construction of the building are the result either of imperfections and mistakes in the original specifications or of the instructions of the superintending engineers in charge of the supervision of the construction work and employed by Behn, Meyer & Company. Such being the case, it is clear that no fault can be attributed to defendants in error by reason of such defects, and no claim of plaintiffs in error for resultant damages can be sustained.

Mr. Campbell, the managing partner of the firm, testifies (Rec. 16, 17) that the construction work on the house was under the constant supervision of a superintendent employed by Behn, Meyer & Company. An engineer named Duff was first employed, and after his death an engineer named Cook.

These engineers superintended the work during the entire time of construction, visiting the work daily and giving con-

stant directions, and making changes and alterations in the plans as the work progressed (Rec., 19-20). The testimony of Behn, Meyer & Co.'s manager, Arnold Dittmar, agrees with this. He testifies (Rec., 30) that as superintendent or surveyor it was Duff's duty, and he had power, to see that the building was properly carried out. The testimony of Mr. Campbell as to the items set out in the eighth paragraph of the complaint (Rec., 2) is precise and definite (Rec., 21-26), and the correspondence between Behn, Meyer & Company and their engineer, Duff, and the defendants in error (Rec., 88-90) shows the constantly recurring alterations in the original plans, all made at the instance of plaintiffs in error.

The witness D. W. SMITH, an expert builder, who had been engaged in the construction business in the Philippines over three and a half years, testifies (Rec., 34), after an examination of the house as constructed and the original plans, that the work done on the building complied with the original plan and contract and that such changes as had been made were improvements.

VINCENTE W. PASTOR, a civil engineer of twenty years' professional experience, fifteen years in Manila, testifies at some length (Rec., 34-39). The substance of his testimony is that the building as constructed fully meets the requirements of the plans and specifications; that the quality of lumber used in the doors is of higher grade than called for in the specifications; that the foundations are better than called for by the original contract, and that such modifications of the original contract as have been made are in the nature of improvements. Mr. Pastor testifies that he found all the items of work claimed in paragraph 8 of the complaint (Rec., 36).

CAYETANO ARGUELLES, an architect, who has practiced his profession since 1884, testifies (Rec., 40-41) that he has examined the house and also the original plans; that the modifications of the original plans are in the nature of improvements; that the foundation has more pillars than

called for by the original specifications; that the foundations are of sufficient strength and meet the requirements of the Manila building ordinances, and that the roof and flooring are well constructed.

Plaintiffs in error relied on the testimony of Major James F. Case (Rec., 41-56) and Robert M. Loper, an inspector of buildings, but without professional qualifications, (Rec., 58-73), to sustain their counter-claim of damage for defective construction. An analysis of the testimony of these gentlemen, however, shows that the defects which they observed in the construction of the house were the result of defects in the original plans or of the use of inferior material called for expressly by the specifications.

Major Case testifies (Rec., 42) that he found certain of the supporting posts or timbers running down half way through the stone foundations, which in his opinion is bad construction, but on cross-examination and after looking at the plan approved by the municipal authorities he admits (Rec., 49) that the plan provided for the posts or pillars passing through the foundations and resting on the ground. He then states (Rec., 49-50) that the method of construction adopted by Campbell & Go-Tauco made a stronger foundation than that provided for in the plan approved by the municipal authorities.

The specifications call for the use of Apitong, Macasim or Amoguís wood for supports, framework, etc.; for Amoguís or Tagili lumber in the flooring, and for Macasim or Apitong wood for the doors. Major Case (Rec., 53) and the witness Loper (Rec., 68) both testify that these woods are of the third or most inferior group or class of lumber as classified by the Forestry Bureau of the islands. Major Case says that lumber of this class is spongy or porous, shrinks and swells with change of temperature, causing the joints to open. Yet this was the kind of lumber called for by the contract, and it is manifest that the defects noted by the witnesses result, not from defects of workmanship, but from the inferior character of the materials called for by the specifications. Major

Case states (Rec., 50) that the joints of the supporting pillars would have been improved if iron straps had been used to reinforce the bolts, but admits that these were not called for by the specifications. The testimony of this witness practically admits that the specifications of the contract were substantially complied with, except where modified to the improvement of the construction, as in the case of the supporting pillars (Rec., 49-50).

The witness PASTOR, called in rebuttal, testifies (Rec., 81-84) that he finds no defect in the foundations; that there was some shrinkage in the rafters, usual in the case of lumber of the kind employed, and that the alterations described in the complaint materially improved the building. When asked to give his opinion of the building, he says (Rec., 84):

> "Now, taking as a base the kind of materials from which this work was done, and comparing the plans with the specifications, I find that the work could not be done in any other way than that in which it was done. I find the building to be acceptable; that the specifications were complied with, except a few defects which are due to the condition of the materials themselves; but they are very small. Therefore I don't find any reason that this job could be rejected by any person who contracted for its construction. That is all I have to say with reference to the house.
>
> "Q. With reference to the bath-rooms in this house, do you believe that they are not baths, and in case they are, that they cannot be used as stated by the witnesses for the defense?
>
> "A. In the first place, neither the specifications nor the plan state what kind of baths are to be built. Now, in my opinion, taking into consideration the plan and specifications, I believe that the contractors have done more than what they ought to—against their own interest."

The dwelling-house was finished in the spring of 1902, and the plaintiffs in error accepted it by moving into it early in May of that year. Mr. Dittmar, manager of Behn, Meyer

& Co., testifies that he has occupied the house continuously up to the time of trial (Rec., 29).

Upon examination of the whole evidence on this branch of the case the Supreme Court made the following findings of facts, which we submit the proof fully sustains (Rec., 100):

> "1. That in the construction of the building the contract, plans, and specifications have been complied with, with the exception of a variation to the advantage of the owner, which is that the principal posts rest upon layers of stone, instead of upon the ground as called for by the plan.
>
> "2. That if there has been any variation from the original plan, this was done largely, if not wholly, with the consent of the owner, and at all events, with that of his agent, the inspecting engineer, and that these changes have been improvements.
>
> "3. That the house was constructed under a contract and specifications which did little more than to designate the size of the building, the material to be employed, and, with the plan, gave a drawing of the building, leaving the details necessarily almost completely to the direction of the inspecting architect or engineer.
>
> "4. That the owner entrusted the direction of the work to an inspecting engineer selected by himself, with full authority to represent him, and that the contractor has performed the work solely in accordance with the direction of the said inspecting engineer.
>
> "5. That although there is some evidence to indicate that a part of the house has settled more than other parts, this is due either to the ground itself or to a defect in plan, or to the directions of the inspecting engineer, and cannot be attributed to a failure on the part of the contractor to comply with the conditions of the contract.
>
> "6. If there are any cracks in the floor and in the joints in the building, this is due to the class of lumber which was selected by the owner.
>
> "7. That the plan of the work and the placing of the principal posts were approved by the city en-

gineer and were in conformity with the ordinances.

"8. That the owner took possession of the house in the month of May, 1902, and has occupied it since that time as a dwelling-house."

These being the facts of the case, the action of the court below in awarding judgment for the balance claimed under the contract is, we respectfully submit, correct in law, and should be affirmed for the following reasons:

(1.) Because plaintiffs in error, having entrusted the direction and supervision of the work to an inspecting engineer selected by and having full authority to represent them, became responsible for any defects resulting from his instructions, directions, or modifications of the original plans and specifications.

(2.) Because, as shown by the evidence of plaintiffs in error's own witnesses, the only departures from the original contract plans and specifications were improvements of the structure as originally planned and directly to Behn, Meyer & Company's advantage.

(3.) Because plaintiffs in error, by taking possession of the house upon its completion and occupying it ever since, have in legal effect accepted same, waived any defects in its construction, and become liable for the full contract price.

(1 and 2.)

The contract is a lease of services for construction work, comprised in chapter 3, Book 4, title 6, of the Civil Code, according to which the contractor is under the obligation of erecting a building, supplying material selected by the owner, and being responsible for the work done by persons whom he employs on the work (articles 1588, 1589, etc., down to 1596 of the Civil Code).

According to article 1591, the architect or inspecting engineer is responsible if the defect is due to his direction or to a defect in the ground, and the contractor does not share this

responsibility with the architect or the engineer (judgment of the Supreme Court of Spain of March 20, 1893).

According to this decision, the architect in charge of the work performed by the contractor is responsible for compliance with the general rules of his profession as applied to the work, and subject to the plans provided by the owner of the building, in the absence of a contrary agreement.

In this case it appears from the evidence that the inspecting engineer was the special agent of the plaintiffs in error, through whom the latter always acted.

From the letters introduced in evidence (Rec., 26, 87) it appears that all their negotiations with the contractor have been through the mediation of this inspector, and that it was his especial duty to see that the work was performed in accordance with the desires of the owners, and although this engineer has changed the plan with respect to the principal posts, which, according to plan, should have rested on the ground, and put them upon layers of stone, this variation has been to the benefit of the owners, and therefore they cannot complain of it, because article 1715 of the Civil Code provides:

> "The scope of the authority shall not be considered as exceeded if it should be fulfilled in a manner more advantageous for the principal than that specified by him."

Furthermore, it may be said, as to the conduct of the owners and the dealings between the parties, that there was an implied agreement between them that this inspecting engineer was to approve the work, and consequently the case falls within the last clause of article 1598, Civil Code, which says: "If the person who has to approve the work is a third person, his decision shall be final."

It appears in this case that all parties agreed that the engineer employed by Behn, Meyer & Co. was to be the one who was to give his approval both as to the form and manner of the execution of the work. At all events, it may

be said that appellants are bound in this case to abide by the results of the actions of this inspecting engineer, because by their conduct he has led others to believe that such was their intention. Article 1727 of the Civil Code provides:

> "A principal must fulfill all the obligations which the agent may have contracted, within the scope of his authority.
>
> "A principal is liable, in so far as the agent has exceeded his power, only when he ratifies the same, expressly or in an implied manner."

It is to be observed that that part of the contract which refers to the duties and powers of the inspecting engineer does not appear to have been expressly agreed upon or at least was not reduced to writing, and we must therefore observe the conduct of the parties for the purpose of understanding the terms of the agreement; as the contract only serves to indicate the intention of the parties and when this intention is known the contract is known.

In this case there can be no doubt there was an expressed or implied contract of agency, and the relation of principal and agent may be created in either of these two ways (article 1710 of the Civil Code).

For the purpose of determining the intention of the parties in this case we must observe principally their conduct contemporaneous with and subsequent to the making of the contract (article 1282 of the Civil Code). This rule of interpretation would be more logically applicable to the case at bar than to a case in which a written contract exists.

It is to be observed that in the case at bar the inspecting engineer acted without a formal letter of attorney, and both he and the contractor were obliged to determine his authority from the conduct of the owners.

Mr. Dittmar, the manager of the defendants, testifies that Mr. Duff, as surveyor—and later Mr. Cook—"had power to see that the building was properly carried out" (Rec., 30).

Under such circumstances it must be understood that the

office of inspecting engineer included power to do all that might be necessary, so that, under his direction, the work might be complete. This was so held by the Supreme Court of Massachusetts in the case of *Damon vs. Inhabitants of Granby*, 2 Pick., 351. In this case authority was conferred upon the town committee to make arrangements with the contractor and to superintend the construction of a building for the town. The court held that to superintend the construction of a building includes the power to make necessary contracts.

In American cases the owner assumes the risk of the sufficiency of the plans and specifications, and must suffer any loss resulting from defects therein. It has been frequently held in the United States that a contractor erecting a building in accordance with plans and specifications provided by the owner is not responsible if the buildings are subsequently ruined by reason of defects in the plans. It is stated that the obligation of the contractor is only that of performing the work with reasonable skill in accordance with the plans furnished by the architects, and that he is not a guarantor of the strength of the building when finished or of its capacity to resist the violence of the wind (*Clark vs. Pope*, 70 Ill., 128; *Sekwastz vs. Saunde*, 46 Ill., 18; *Burke vs. Dunbar*, 128 Mass., 499; *MacRichie vs. Lake View*, 30 Ill. App., 393).

In the case of *Burke vs. Dunbar, supra*, the plaintiff contracted with the defendant for the construction of a sea wall of certain dimensions, in a complete and workmanlike manner, to the satisfaction of the defendants, at a certain price payable in installments as the work progressed. The purpose of the wall was to enclose a permanent wharf for a landing place for steamers, and was to be filled in with earth. The lines of the sea wall were pointed out by the defendant's agent and the plaintiff commenced to lay stone along these lines, upon what appeared both to the plaintiff and the agent to be a bed of sand and gravel, and upon

which they believed the wall could safely be erected. As the work progressed it appeared that this bed of sand and gravel was merely a stratum above a bed of mud some 15 feet in depth at the end of the wall and less toward the shore. As soon as the plaintiff found out that the foundation of the wall was insufficient he so notified the defendant, who told him that he would do the best he could to preserve the wall, and shortly after sent an expert in the construction of sea walls to superintend it. This expert placed a row of piles beyond the extreme end of the wall and paid the plaintiff an extra price for putting the stone already laid around these piles and for making the wall thicker than was required by the contract. The agent did not supply the pile foundation by the side of the wall, which had by this time been constructed for a short distance, and made no objection to the plaintiff constructing this wall without piles.

The proof tended to show that the defendant made the payments required by the contract when the end wall was completed and one of the side walls, and that he accepted the completed work and consented to allowing a third person to measure the wall, which he did, reporting the result to the parties, and that the defendant agreed to pay the balance to the plaintiff. The defendant's proof tended to show that the side walls had settled because there was not sufficient foundation; that the stones were not of a proper size; and that the wall was not built in a workmanlike way, but upon this point the evidence was conflicting.

The court held that the obligation of the plaintiff was to build a wall of the dimensions specified in the contract and that the plaintiff was entitled to recover the price; that the owners of the wharf contracted for its construction, providing a plan and specifications to the contractor, who built it in accordance therewith, and the latter is not responsible for the destruction of the wharf by reason of defects in the plan.

Beswick vs. Platt, 140 Pa. St., 8.

A contractor working upon plans and specifications of an architect only assumes the obligation that his work will be completed in a workmanlike way, and if he has performed the work in accordance with the plans he cannot be held responsible for damages arising from a fall of the building caused by a defect in the plan unknown to him (*Deagling vs. Gilmore,* 49 Ill., 248).

The warranty clause of the contract cannot be extended to include the liability of the contractor for a failure of work to continue in good condition by reason of defects in the plan or drawing, or because the work in particular places was performed in accordance with expressed directions of the inspecting engineer (*MacRitchie vs. Lakeview,* 30 Ill. App., 339).

On a contract for the repair of a building calling for a combination elevator both for passengers and freight, without more particular specifications, it was held that the contractor could not be held responsible for the failure to put doors on the elevator in the absence of proof that it was a custom of the trade to provide such doors in the absence of specifications, and the testimony of a witness that in his opinion doors were proper and necessary is not sufficient to establish it (*Horgan vs. McKenzie,* 17 N. Y. Supp., 174).

That a contract to supply material for the ironwork of a building and the performance of the necessary work referred to on plans and specifications which only show openings for transoms, without giving the size, weight, or data as a guide for their contruction, so that the contractor could not make them without additional plans and specifications, the construction of such transoms is not included in the contract and the contractor could properly refuse to build them (*Sexton vs. Chicago,* 107 Ill., 323). (This citation is particularly in point upon the extras charged in the complaint, as, for instance, transoms, baths, doors, windows, etc.)

An owner, by authorizing an architect to inspect the construction of a building, makes him his agent for all pur-

poses necessary for the construction and safety of the building. Therefore, when it is necessary, in order to make the building safe, he can bind his principal for extra work and material, and even modify the text of the original contract (*Gibson County vs. Motherwell Iron, etc., Co.*, 123 Ind., 364; *Clinton County vs. Hill*, 122 Ind., 215; *Harris County vs. Bryne*, 67 Ind., 21).

When the contractor has substantially performed the contract, but the result does not conform to the requirements of the contract, owing to defects in the plans or any other error or omission of the owner, the contractor is not responsible (*Manville vs. McCoy*, 3 Ind., 148; *Kundzon vs. Hanson*, 28 Nev., 591).

A contractor is not responsible for defects in the work occasioned by the material selected by the owner (*True vs. Bryant*, 32 N. H., 241).

The contractor is liable for defects only in case he has failed to comply with the conditions stipulated in the contract (article 1592, Civil Code).

This liability does not arise when from the report of the experts nothing appears beyond settlement and deterioration which can be readily repaired and at a trifling cost, and in this case the owner is under the obligation of paying the price (Judgment of the Supreme Court of Spain, June 17, 1903).

(3.)

When the owner accepts the work and makes use of it after its termination, as a general rule, it will be held that he has waived defects in the construction and is liable to the contractor for the price *Duell vs. McCraw*, 86 Hun. (N. Y.), 331; *Harris County vs. Campbell*, 68 Tex., 22; *Beswick vs. Platt*, 140 Pa. St., 28; *Katz vs. Bedford*, 77 Cal., 319; *Andrews vs. Portland*, 35 Me., 475; *Oregon Imp. Co. vs. Roach*, 117 N. Y., 527; *Dubois vs. Delaware, etc., Canal Co.*, 4 Wend. (N. Y.), 285; *Porter vs. Stewart*, 2 Aik.

(Vt.), 417; *Waters vs. Harvey*, 3 *Houst. (Del.)*, 430; *Trowbridge vs. Barrett*, 30 Wis., 661; *Howard vs. Oshkosh*, 37 Wis., 242; *Ford vs. Smith*, 25 Cal., 675; *Hagerstown Presbyterian Church vs. Hoopes Artificial Stone Co.*, 62 Md., 598; *Potomac Steamboat Co. vs. Harlan, etc., Co.*, 66 Md., 42; *Garrison vs. Dingham*, 56 Ill., 159; *Merriweather vs. Taylor*, 15 Ala., 735; *Hawkins vs. Gilbert*, 19 Ala., 54; *Bailey vs. Woods*, 17 N. H., 365; *Lucas vs. Godwing*, 3 Bing. N. Cas., 737; and see *Johnson vs. Harvey*, 30 Md., 259; *Maysville, etc., Turnpike Road Co. vs. Waters*, 6 Dana (Ky.), 62; *Zottman vs. San Francisco*, 20 Cal., 96; 81 Am. Dec., 96; *Jewet vs. Weston*, 11 Me., 346.

This is a rule which should be applied in the case at bar, because article 1893 of the Civil Code provides as follows:

> "The owner of property or a business who avails himself of the advantages of the administration of another, even when he has not expressly ratified it, shall be liable for the obligations contracted for his benefit, and he shall indemnify the administrator for the necessary and useful expenses which he may have incurred and for the losses he may have suffered in the discharge of his duties."

The acceptance or voluntary use of the object of the contract is proof of its execution or of a waiver of non-performance.

In *Veazie vs. Bangor*, 51 Me., 509, the contract contained a provision to the effect that it would be proved that the materials have been furnished and work done in accordance with plans and specifications by the certificate of the architect. The court, awarding judgment for the contract price, said:

> "The entry of the plaintiffs into the possession and enjoyment of the building is sufficient proof that they were satisfied upon this point (performance of the contract). The production of the certificate could not have had greater effect." (See, also, *Blethen v. Blake*, 44 Cal., 120.)

When a party contracts with another to fix upon a good site for the location and construction of a mill, the acceptance of the mill is a waiver of any objection as to the site (*Emerson vs. Coggswell*, 16 Me., 77).

The house having been constructed under the direction of the owners' inspecting engineer, and it being a principle of law that the plaintiff is liable to third persons for all that may be done or said by his agent, including his negligence and admissions within the actual or apparent scope of his authority, there can be no claim against the contractor for not having performed the work in compliance with the plan and specifications, in the absence of the allegation and proof that the contractor conspired with the agent or knowingly concealed defects from the owner, and upon this point, in this case, there is an absolute lack both of allegation and proof.

It is a principle of law, so well established that it is not necessary to support it by authorities, that when the owner, by himself or by his agent, has directed the construction of a building, he cannot, in the absence of fraud, which must be alleged and proved, make any objection as to the manner of the execution of the work. If there are any defects it is his duty to speak when they occur in order that the contractor may remedy them at the least possible expense, and if he does not do so it must be concluded that he has consented to them, and after that he cannot make an objection because one is estopped from objecting to things to which he has solemnly consented (Judgment of the Supreme Court of Spain, July 13, 1894).

This is an indisputable presumption, because paragraph 1 of article 333 of the Code of Civil Procedure provides:

> "Whenever a party has, by his own declaration, act, or omission, intentionally and deliberately led another to believe a particular thing true, and to act upon such belief, he cannot, in any litigation arising out of such declaration, act or omission, be permitted to falsify it."

If there was any defect in the placing of the principal posts which was done under the personal superintendence and direction of the defendants' engineer, it was his duty to mention it at the time, so that it might have been corrected at a trifling expense.

To allow him to refrain from doing so and to keep silent, thereby leading the contractor to believe that the work was approved, and then permit him to speak after the house was finished and completed, would be a wrong to the contractor so grievous that no court of justice should permit it.

Many cases are cited on appellants' brief (pp. 8-17) to the effect that the taking possession of a building erected on the owner's land does not operate as an acceptance or imply a waiver of due performance of the contract of construction.

It is to be observed, however, that in these cases the courts are careful to point out that such taking possession and occupancy must be under protest in order not to operate as an acceptance of the building. Thus in *Corwin vs. Wallace,* 17 Iowa, 374, 377, the court says:

> "Such use, *under protest, accompanied with complaint that the contract had not been performed by the undertaker,* would not be a waiver of his right to insist upon the due execution of the contract."

And again, in *Wilson vs. School District,* 32 N. H., 118, 125, the court says:

> "Alone, the use of such buildings gives no evidence of acceptance. *Accompanied by silence and the absence of complaint, when to complain would be natural and suitable, or by any circumstances indicating acquiescence, it would be evidence.*"

Hanley vs. Walker, 79 Mich., 607; 8 L. R. A., 207, was an action brought to recover for plastering work performed under a contract that payments should be made upon certificate of the architect in charge of the work. The fact was undisputed that plaintiffs had *not* obtained the architect's

certificate accepting the work. Under these circumstances the court said:

> "Under the testimony appearing in this record, the fact of the defendants taking possession was not such an acceptance as relieved the plaintiffs from the terms and conditions of the contract requiring them to obtain the architect's certificate before they were entitled to payment."

Obviously in this Michigan case the withholding of the architect's certificate was in itself a protest against the character of the work performed. Moreover, the contract work was there the plastering of houses otherwise completed. The taking possession by the owner under such circumstances is widely different in effect from taking possession where the contract covered the erection and completion of the entire structure.

In *Malbon vs. Birney,* 11 Wis., 107, the contractor undertook to build a house complete. He abandoned the contract after doing but a small portion of the work. It was under these circumstances that the court held that the taking possession by the defendant did not constitute an acceptance of the small amount of work performed by the plaintiff contractor.

Again, in *Escott vs. White,* 10 Bush., 169, the court, in holding that the taking possession of the building by appellants should not be considered as an acceptance by them, said (p. 173):

> "They had no alternative but to take possession as they did, *protesting all the while that appellees had failed to comply with their agreement.*"

In the case at bar, however, there is nothing in the evidence to show that the plaintiffs in error refused to accept the house under the contract or make any protest before taking

possession. It is true that paragraph IX of defendants' answer (Rec., 4) alleges:

> "That plaintiff has not completed the defendant's dwelling-house referred to in Plaintiff's Exhibit A according to the plans and specifications also referred to therein, or at all, but has refused to do so, and has abandoned work upon the said house since about the first day of May, 1902, although frequently requested by defendant to complete said house in accordance with said contract."

There is, however, a total failure of proof to support any allegation that plaintiffs in error themselves, or by any one in their behalf, made any protest on account of the non-performance of this contract before taking possession of the house. Mr. Dittmar (Rec., 75) states that he did not accept, by writing or any agreement with Campbell & Go-Tauco, the house as finished. There is nothing, however, either in the contract (Rec., 3) or the specifications (Rec., 6) providing for any formal acceptance by Behn, Meyer & Co. or any one else, of the work done under the contract.

On page 78 of the record, Mr. Dittmar testifies thus:

> "Q. When did you occupy the building?
> "A. Beginning of May, 1902.
> "Q. Who gave the possession of this building to you?
> "A. Nobody.
> "Q. Before you took possession of the premises did you examine it?
> "A. Yes, I did.
> "Q. Where were you living before going into this building?
> "A. Calle Nozaleda.
> "Q. And after examining this new building you moved all your furniture into it, did you not?
> "A. No, I bought all new furniture.
> "Q. And you quit that house at Calle Nozaleda?
> "A. Yes."

And on page 29 Mr. Dittmar states that he has continued to occupy the house ever since the first of May, 1902. The only evidence of any representation of dissatisfaction with the work on the house before the filing of defendants answer is the statement of Mr. Dittmar (Rec., 81) that he notified the contractors several times to repair a bath tub by providing plugs. When he asked the contractors to do this does not appear, presumably after he had taken possession of the house.

It would, we submit, be manifestly unjust to hold, under the circumstances of this case, as disclosed by defendants' own testimony, that they are not bound by their act of taking possession of the house and continued occupancy *without protest or complaint up to the time when suit was instituted.* Absolutely nothing appears herein why plaintiff in error should not be estopped by these acts of acceptance from denying the full performance by appellees of their contract.

III.

The counter-claim for alleged overpayment on contract for filling lot.

The contract for the filling of the lot on the Pasig river (Rec., 7) provided for the delivery of "a suitable filling composed of earth and sand of good quality, at the rate of $1.30 Mexican currency per cubic meter. Material will be measured in whatever way the said Campbell & Go-Tauco, with the approval of Behn, Meyer & Co., deem most expedient, then spread evenly over the ground to bring the lot to a certain level, which level will be determined by Behn, Meyer & Co."

Under this contract Campbell & Go-Tauco began the delivery of the sand for filling about July 14, 1901, and continued to deliver same until the April following. The sand was delivered in bancos and was receipted for, in cubic meters, by the agent of Behn, Meyer & Company, who lived

there on the spot (Rec., 91, 3, 18, 31-2). A total of 62,690.50 meters was receipted and paid for by Behn, Meyer & Company (Rec., 86). They paid on account of the sand a total of $81,497.65 Mexican. Campbell & Go-Tauco claim that they delivered a total of 64,444 cubic meters of sand, which at the agreed price of $1.30 per cubic meter would have entitled them to $83,777.20 Mexican, or $2,279.55 more than they were paid. Inasmuch as the receipts produced covered only 62,690.50 cubic meters, the court below rejected the claim for the 1,753.50 additional cubic meters (Rec., 8, 105).

Mr. Campbell testifies (Rec., 18) that receipts were given daily by Behn, Meyer & Co.'s representative, and at the end of each week a bill in duplicate was rendered covering deliveries to date, which on being O. K.'d by the manager of the firm was presented for payment. He says:

> "I was always paid—made my bills—from the receipts given to me during the week.
>
> "Q. Before payment, would they examine the bills or receipts or any other papers?
>
> "A. I always furnished the receipts with the bills, and they looked over the receipts, and they had also their own book which they always went over, and the two books always correspond—at least the receipts and their books were the same. In case there was any discrepancy in the matter of a tenth of a meter, it was always arranged right at that moment before the bill was O. K.'d by the manager."

Payments by Campbell & Go-Tauco were made to the banca men upon the measurements made by Behn, Meyer & Co.'s representative, as shown by these same receipts. As stated by Campbell in his letter of April 30, 1902, to Engineer Cooke (Rec., 87):

> "It is the basis on which I have paid the banca men for the sand delivered me. They have been paid—meter for meter—upon the measurement adopted by the representative of Behn, Meyer & Co. and myself."

GEORGE IGNACIO CERCAL, who was one of the three men successively employed by Behn, Meyer & Co. to measure the filling material, testifies (Rec., 31-33) that he was employed by Behn, Meyer & Co. from October, 1901, to February, 1902, to measure and keep account of the sand delivered. He produced the two books in which he kept the account, which were admitted in evidence, but do not appear in this record. The witness states he entered every cubic foot of sand received on the ground. His method of computation was by measuring the load-line of the bancas and from that determining the cubic contents. He says that in so measuring he was following the instructions of Mr. Cottoncamp (Kattenkamp), Behn, Meyer & Co.'s manager.

ARNOLD DITTMAR, the managing partner of plaintiffs in error, testifies (Rec., 29):

> "Q. As the manager of Behn, Meyer & Co., did you at any time personally pay, or direct your subordinates in the office to pay, any bills for sand?
> "A. Yes, sir, I did.
> "Q. Before paying any bill, what books would you refer to?
> "A. No books, only the receipts.
> "Q. What receipts?
> "A. Receipts signed by the man employed by me.
> "Q. Have you these receipts sent to you by your employee?
> "A. Yes, sir, he brought them over himself.
> "Q. Well, have you got some of them now?
> "A. Yes, they are lying there.
> "Q. Who gave this book to you?
> "A. I had it in the office, but I couldn't say who wrote it.
> "Q. Why did you have this book in your office?
> "A. Well, we put down according to the receipts that we had receipted for, and afterwards brought the book to our office."

To disprove the entries of their own books and the receiptsof their own representatives, plaintiffs in error produced

the two witnesses, Major James F. Case (Rec., 41-57) and Robert M. Loper (Rec., 58-73). The last delivery of sand was in April, 1902. It does not appear when these witnesses made their examination, but it was certainly many months after the completion of the contract (Rec., 90). Major Case testifies that he found the superficial area of the lot to be 16573¼ square meters. Mr. Loper says it was 15,549.62 square meters (Rec., 46, 63). Neither of the witnesses appears to have been familiar with the lot in question before it was filled. Their method of computation was to sink five or six holes in different portions of the lot to what they called the original soil. Five holes gave an average depth of 1.10 meters. From these measurements the witnesses, adding 15 per cent. for settling of the fill, reach a conclusion that about 20,965 cubic meters were used in the fill (Rec., 46, 64). The land, before filling, was a zacate field "covered with very deep ditches." "In parts a paddy field, and in other parts a swamp, where the people fished and watered carabaos" (Rec., 18). Major Case admits (Rec., 46-7): "I didn't see this zacate field before it was filled up, and I didn't know how many of these little ridges there were or how many canals may have existed on the property." There is nothing in the record to show whether the holes sunk by these witnesses were where the ridges were or the canals or the more level portion. Their whole testimony is admittedly a matter of guesswork, essentially inaccurate. Major Case allows for a shrinkage of 15 per cent., but the witness Pastor states that in river sand, such as used in this fill, as high as 38 per cent. should be allowed for settling (Rec., 38-54).

There is nowhere any allegation of fraud or deception on the part of these defendants in error, and the only attempt on the part of the plaintiffs in error to disprove the accuracy of the records kept by their representative is by the introduction of the testimony of Major Case and Loper,

neither of whom was familiar with the land before it was filled up.

As to the evidence on this branch of the case, the court below says (Rec., 102-104):

> "The burden of the proof is on the defendants to show that they did not receive the 62,690.50 cubic meters of sand and earth, and on the plaintiffs to show that they delivered 1,753.50 cubic meters of sand and earth for which they were not paid.
>
> "Pursuant to their contract, the plaintiffs began to deliver the sand and fill the lot on or about July 14, 1901, and continued to deliver the same until April, 1902.
>
> "The sand was measured in bancas by the agent or servant selected and paid by the defendants. Receipts for this sand were given daily to plaintiffs, and at the end of each week duplicate bills were rendered by them to the defendants, which were O. K.'d by the manager of the defendant's firm and then paid.
>
> "The authorized representative of the defendants who gave the receipts was on the ground constantly to receive this sand—in fact, he lived on the ground. The sand was taken from the river and was wet when delivered.
>
> "The defendants kept a book account of all sand delivered. The plaintiffs kept a man there to see to it that all the filling went on and to take the receipts from defendant's representative. One of the representatives of the defendants, who measured the sand, was called by the plaintiffs as a witness and testified that he measured the water line of the bancas containing the sand. That the number of cubic meters of sand were told by certain marks on both sides of each banca, and that he was instructed by the manager of the defendants that it was not necessary to measure the bancas. The defendants, by their own books and receipts, and as measured by their own agents and servants, showed that they received and paid for 62,690.50 meters of sand and earth.
>
> "In order to disprove their own admissions and books, they called two expert witnesses to show that this amount of sand and earth was not on the lot in

question at the time of the measurement of these witnesses—presumably after September 6, 1902, for in the letter of the defendants to the plaintiffs of that date the former do not appear to have had the figures subsequently given by these witnesses—and many months after the sand and earth was all delivered.

"The defendants did not call as witnesses any of their own agents or servants who measured this sand at the time of delivery, nor any of the banca owners or managers to show the amount delivered.

"The lot which was filled contained, according to defendants' witnesses, a superficial area of 16,573.50 sq. meters.

"It was, before it was filled, a rough piece of land, covered with very deep ditches, in part a paddy field and in part a swamp where people fished and watered their carabaos. The defendants' experts made a survey of this lot, and an examination of the sand thereon, many months after it was deposited, with a view of determining the amount of sand originally deposited there by the plaintiffs. They measured the area of the lot, and sunk five or six holes down to what they called the original soil, took the depth of the sand as shown by these holes, made a general average, allowing 15% for settlement, and reached the conclusion that there had been placed thereon a quantity of sand amounting *approximately* to 20,965 cubic meters. These holes, it was said, were distributed at intervals over the property so as to enable the witnesses to get an average 'guess' at, or approximation of, the amount delivered.

"One of these experts stated that he did not see this zacate field before it was filled up, and that he did not know how many little ridges there were or how many canals may have existed on the property.

"We cannot assume, in the absence of proof, that these witnesses sunk holes in that part of this large lot where the deep ditches or canals existed or where the swamp was. The correctness of the conclusion reached by these experts depended, to a great extent, on the depth of the holes sunk through the sand, and this depth depended on whether or not they were sunk on the level part of the lot or in the ditches or swamp.

"The evidence, therefore, is uncertain and does not enable us to accurately determine the exact number of cubic feet of sand or earth delivered on the lot; and this is especially true when the evidence shows that the conclusions of the defendants' experts are disputed by two experts called by the plaintiffs, experts of larger experience than those of the defendants and equally as competent to give opinions on this question.

"These experts called by the plaintiffs testified that the amount of sand and earth mentioned as delivered and paid for could have been delivered on this lot and yet show no greater bulk than that which appeared there when the defendants' experts made their measurements, provided a greater percentage were allowed for settlement, and they cited the works of eminent engineers to show that the allowance for settlement should be from 31 to 38 per cent. instead of 15 per cent.

"In view of the fact that this filling was measured at so long a time after it was placed on the lot; in view of the fact that the estimates of these witnesses of the amount delivered is but an approximation or 'guess;' in view of the conflict of testimony regarding such amount; and in view of the fact that the defendants, by their authorized representatives, actually measured the sand and earth at the time of the delivery of each banca load, in the manner directed by the manager of the defendants, we cannot now say that this latter measurement is all wrong and the new measurement all right, especially when there is no proof that any fraud or deceit was practiced on the defendants in the matter of measurements or in the keeping of the accounts thereof.

"The learned judge who tried this case seems to have been of the opinion that because the contract states that the amount of sand to be delivered shall be *'over* 15,000 cu. meters,' therefore it was a conclusive corroboration of his finding that not more than 21,000 cubic meters of sand was placed on the lot.

"If only about 15,000 cubic meters were intended, why did not the defendants stop the delivery when

they knew that 15,000 cubic meters had been delivered? After the amount had gone beyond that mark, why were not the defendants put upon inquiry? Why, if they suspected anything wrong in the measurement, did they not make an investigation?

"Delivery of filling began early in July, 1901, and down to October 20th of that year the amount delivered exceeded 16,000 cubic meters according to the defendants' own record. Why, then, if only about 15,000 cubic meters, or even 21,000 cubic meters were sufficient to fill the lot, did the defendants let the filling go on during the remainder of October, the whole of November and December, 1901, and January and February and down to the latter part of March 1902? And this without a word of complaint from the defendants during its progress, and not a word afterwards until plaintiffs began to press defendants for their unpaid balance on the house contract."

The contract for this filling (Rec., 7) provides that "material will be measured in whatever way the said Campbell & Go-Tauco—with the approval of Behn, Meyer & Co.—deem most expedient." As matter of fact, the measurement of material was left in the hands of plaintiffs in error. They employed their own representatives to make the measurement, and payments were made to defendants in error only on receipt given by Behn, Meyer & Co.'s representatives (Rec., 18, 29). There can be no dispute as to these facts; they are frankly admitted by Mr. Dittmar in his testimony. One of Behn, Meyer & Co.'s representatives, employed to measure the filling material, was called, and testified (Rec., 31). He says he noted in certain books the sand delivered. These books he took to Behn, Meyer & Co.'s office. This method of account was ordered by their manager, Mr. Kattenkamp, and later by the managing partner, Mr. Dittmar. Witness testifies that Mr. Kattenkamp, Behn, Meyer & Co.'s manager, instructed him how to measure the

material, and he followed his instructions. He measured the water line, or load line, of the bancas, or scows, in which the sand was delivered, and so computed the cargo. He says (Rec., 33):

> "There are certain marks on both sides of the bancas, and I measured the contents by those marks, which they use on the water line; and it was the instruction of Mr. Cottoncamp [Kattenkamp] that it was not necessary to measure the bancas."

This measurement by displacement is, of course, a perfectly proper and often adopted method of computation. Under the conditions it was probably the most accurate and feasible method which could have been employed.

There is, as stated by the court below, no evidence of fraud on the part of Cereal or any other person employed by Behn, Meyer & Co. to make these measurements, or of any one else. The only evidence to overcome the *prima facie* proof of their written receipts for material is the testimony of the two witnesses Case and Loper, who first examined the ground many months after the filling was completed. They made an estimate based on a superficial measurement and the sinking of five holes in different parts of the lot. The estimate, manifestly, is guesswork at the best. It fails utterly to overcome the presumption raised by plaintiffs in error's own receipts.

The measurement being made by these men employed by Behn, Meyer & Co., the case is controlled by section 1598 of the Civil Code, which provides that:

> "If the person who has to approve the work is a third person, his decision shall be final."

Where under a contract the work done or materials furnished are to be measured by some agreed person, his determination as to quantities and amounts is conclusive on the parties in the absence of fraud or of such gross error as

to imply bad faith. This rule was settled by this court in *Kihlberg vs. United States,* 97 U. S., 398. In this case Kihlberg made a contract with the United States for the transportation of Government stores and supplies which provided that the distance between the points of transportation should be ascertained and fixed by the chief quartermaster. The contractor, Kihlberg, disputed the correctness of the quartermaster's estimates and brought suit in the Court of Claims to recover on the basis of additional mileage. This court, by Mr. Justice Harlan, after stating that there was no proof of fraud or bad faith on the part of the quartermaster in making his ascertainment of distances, said (p. 401):

> "The difference between his [the quartermaster's] estimate of distances and the distances by air line, or by the road usually traveled, is not so material as to justify the inference that he did not exercise the authority given him with an honest purpose to carry out the real intention of the parties, as collected from their agreement. His action cannot, therefore, be subjected to the revisory power of the courts without doing violence to the plain words of the contract."

And this rule was affirmed in *Sweeney vs. United States,* 109 U. S., 618; and again in *Martinsburg, etc., R. R. Co. vs. March,* 114 U. S., 549.

The case of *Chicago & Santa Fé Railroad vs. Price,* 138 U. S., 185, is on all fours with the case at bar, and the decision of this court therein should be here controlling. The contract was for the construction of a railway road bed. It provided for monthly payments to the contractor "on the certificate of the engineer," whose determination as to quantities and amounts should be conclusive. On a subsequent estimate of another engineer it was claimed that the estimates on which monthly payments were made were excessive, and the railroad company retained the balance of 10 per cent. of monthly payments held to await completion of contract. The contractors brought an action to recover

this balance. The facts as found are thus stated by Mr. Justice Harlan in the opinion of the court (p. 194):

> "The work was in four divisions, each division being in charge of an assistant or division engineer, who acted under the general direction of the chief engineer. The agreement provided for monthly payments to the contractor, on the certificate of the engineer 'for work done;' ten per cent. from the value thereof to be retained by the company until the whole work was completed in accordance with the contract. The work was under the immediate supervision of the division engineer. On the first day of each month he made up and forwarded to the assistant chief engineer an estimate of work done on each section of his division, according to quantities and classifications. Upon such estimates the assistant chief engineer ascertained the amount due the contractor to the beginning of the month. These monthly estimates were approved by both the assistant chief engineer and chief engineer. This course was pursued until the work was substantially completed, and was accepted and taken possession of by the company. Subsequently, without the knowledge or co-operation of the contractors, Baker, a subordinate engineer of the railroad company, who had not supervised the work of the plaintiffs, re-estimated and reclassified it, and upon such re-estimate and reclassification, which were approved by the chief engineer, the company claimed that the monthly estimates upon which the plaintiffs had been paid from time to time were much too large."

On the facts as thus stated the court held (p. 195):

> "We are of opinion that the ultimate facts, as found by the court, do not authorize the railroad company to go behind the estimates from time to time by its division engineer, which were approved and certified by the assistant chief engineer and chief engineer. Within a reasonable interpretation of the contract, the last monthly estimate of work done on division nine (that being the only division here in dispute) followed by the acceptance by the company of the

whole work, was a certificate of complete performance entitling the plaintiffs to be paid in full according to the terms of the contract. While there was evidence tending to show that the estimates by the division engineer, upon which the last monthly certificate was based, were not made up from actual measurements on the ground, but from reports by subcontractors, there was, also, evidence tending to show that the remeasurements and reclassifications which the company caused to be made after the completion and acceptance of the work, and which it calls the 'final estimate,' were inaccurate. But there is no fact distinctly found indicating fraud upon the part of the company's engineers, or such gross mistakes by them as imply bad faith. It is found only that the monthly estimates might, with reasonable care, have been made nearly accurate, and that, *if* the remeasurements and reclassifications were correct, the discrepancy between them and the monthly estimates, upon which the plaintiffs were paid from time to time, could be explained only upon the ground of negligence, incompetency or dishonesty upon the part of the division engineer. But the court did not find that the monthly estimates were inaccurate, or that the chief or division engineer was dishonest, or that the subsequent remeasurement and reclassification were correct. The mere incompetency or mere negligence of the division or chief engineer does not meet the requirements of the case, unless their mistakes were so gross as to imply bad faith."

In the case at bar, where the persons who measured the material were appointed by plaintiffs in error, were in their employ, and followed the method of measurement designated by them, the rule as above stated surely applies with greatest force.

There being absolutely no proof of fraud, and the evidence being entirely insufficient to establish mistake, let alone error so gross as would imply bad faith, we submit that the action of the court below in rejecting the second counterclaim of plaintiffs in error is manifestly correct.

As said in the court's opinion (Rec., 105):

> "This case, in the absence of evidence of a mutual mistake, is governed by the doctrine of estoppel. The defendants measured the sand, they receipted for it and they paid for it. They cannot now say they did not receive it. It comes within the principles laid down in Austin *v.* Wauful, 36 S. R. (N. Y.), 779, where it was held that a receipt given by the plaintiff in that case for the property in question estopped him from denying that he had the property when the action was brought.
>
> "In Behring *v.* Somerville (44 At. Rep.,641) it was held that the fact that both parties had equal means of information, and money was paid upon a mistake of fact, cannot, in the absence of fraud, be recovered back, the money being that of the payee.
>
> "It follows that the defendants are not entitled to recover from the plaintiffs the said sum of $52,000 Mexican currency allowed by the court below."

See also *Ogden vs. United States,* 60 Fed. Rep., 725; *Mundy vs. Louisville, etc., Ry. Co.,* 67 Fed. Rep., 633, 637; *Elliott vs. M., K. & T. Ry. Co.,* 74 Fed. Rep., 707, 711.

And the same rule that the estimates of a person agreed to by the parties to the contract cannot be avoided except for fraud, or such gross mistake as would imply bad faith, is laid down in numerous decisions of the State courts and the English cases. Amongst others, in *Dingley vs. Greene,* 54 Cal., 333; *Barton vs. Hermann,* 11 Abb. Pr. N. S. (N. Y. C. Pl.), 381; *Dorwin vs. Westbrook,* 71 Hun. (N. Y.), 405; *Stewart vs. Keteltas,* 36 N. Y., 388; *Wilcox vs. Stephenson,* 30 Fla., 377; *Kork vs. Lull,* 70 Ill., 420; *Snell vs. Brown,* 71 Ill., 133; *Cocy vs. Lehman,* 79 Ill., 173; *Taylor vs. Rem,* 79 Ill., 181; *Bournique vs. Arnold,* 33 Ill. App., 303; *Hudson vs. McCartney,* 33 Wis., 331; *Boettler vs. Tindick,* 73 Tex., 488; *Condon vs. South Side R. Co.,* 14 Gratt. (Va.), 302; *Baron de Worms vs. Mallier,* L. R., 16 Eq., 554; *Sharphe vs. San Paulo R. Co.,* L. R., 8 Ch., 597; *Dunaberg, etc., R. Co. vs. Hopkins,* 36 L. T., 733; *Harvey vs. Lawrence,* 15 L. T. N. S., 571.

Opposing counsel quote the letter of Behn, Meyer & Co., dated April 28, 1902 (Rec., 86), to appellees asserting this alleged excess payment and demanding satisfactory explanation within the next three days; otherwise "our attorneys are instructed to take up the case at once." But they fail to quote the instant reply of Mr. Campbell (Rec., 87), showing that the measurements were made by plaintiffs in error's own representative, were accepted by defendants in error, who on the *same* measurements, "paid the banca men for the sand delivered to me." We invoke examination of this letter. It is significant that no action was brought by plaintiffs in error *then* and nothing done by them until, in their answer filed on November 24, 1902—over six months later—they set up this counter-claim based on the *ex parte* measurements of others made long afterward.

In conclusion, we submit the absurdity of the claim of plaintiffs in error for this alleged overpayment is manifest from the facts that the work was situated where it could be daily inspected by the managers and principals of Behn, Meyer & Co., and that although more than 30,000 cubic meters of sand had been receipted and paid for in December, 1901, no question was raised as to the quantity of material, and during the months of January, February and March, 1902, over 30,000 cubic meters additional were receipted and paid for. The managing partner of plaintiffs in error, Mr. Dittmar, was in Manila from the end of January, 1902 (Rec., 81), yet he took no steps to investigate the matter, but continued to pay for filling material without question; and yet he testifies that he was perfectly familiar with the property.

For the reasons stated, we respectfully submit that the judgment of the court below should be affirmed.

Respectfully submitted,

ALDIS B. BROWNE,
ALEXANDER BRITTON,
Counsel for Defendants in Error.

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IN THE

SUPREME COURT OF THE UNITED STATES.

October Term, 1906.

No. 227.

HESS, MEYER & COMPANY, Plaintiffs in Error,

vs.

CAMPBELL & GUTAUCO.

BRIEF AND ARGUMENT ON BEHALF OF DEFENDANTS IN ERROR.

Argus B. Thomas,
Isaac Hayward,
Counsel for Defendants in Error.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 227.

BEHN, MEYER & COMPANY, PLAINTIFFS IN ERROR,

vs.

CAMPBELL & GO-TAUCO.

MEMORANDUM IN REPLY IN BEHALF OF DEFENDANTS IN ERROR.

I.

Questions of fact are not reviewable here upon writ of error.

(Main Brief, pp. 10-14.)

II.

The motion for new trial expressly averred that the findings of fact were "clearly and manifestly against the weight of evidence." The motion was denied and due exception taken (Rec., 12). Hence, under section 467 of the Code of Civil Procedure, the Supreme Court was required to review the evidence. But such review cannot, we submit, be again here reviewed on writ of error. The case of *De La Rama vs.*

De La Rama, 201 U. S., 303, rules only that upon *appeal* from the Supreme Court of the Islands, precisely as on appeals from the circuit court, the review in such cases extends to both law and fact. But no such review upon facts extends to cases coming on writ of error from the circuit court, and section 1011, United States Revised Statutes, expressly provides that there shall be no reversal "for any error of fact" in such cases. If the argument *contra* be sound, then the whole record is open upon either writ of error or appeal—a manifest *non sequitur*.

III.

The findings of the Supreme Court in respect of the house abundantly sustain the judgment, independently of the question of law ruled by that court in respect of taking possession by the owner. Certainly taking possession without protest, objection, or complaint, and continued use thereof—upon the very cases cited by plaintiff in error—creates corresponding liability of payment.

(Main Brief, pp. 27-32.)

And upon every element of performance of contract by defendants in error the ultimate facts found (Rec., 100-101) demonstrate the correctness of the court's conclusion therefrom (Rec., 101) that—

> "It follows, that inasmuch as the plaintiffs *complied with their contract and constructed the house according to the plans and specifications and under the direction of the defendants or their authorized agents*, they are entitled to recover therefor the unpaid balance as found by the court below, viz., $9,250.62, Mexican currency."

IV.

In respect of the filling, the facts stated in the opinion of the Supreme Court are sustained by the evidence. If they are reviewable here, *résumé* thereof is given on the Main Brief, pages 33-41. We submit, they fully sustain the court's statement of the proven facts and its conclusions thereon. The sand was measured in fact by plaintiff in error's own representatives (Main Brief, p. 41), and the contractors, accepting those measurements, in turn paid the men delivering the sand on the same measurements. The letter of Mr. Campbell (Ex. 4, Rec., 87) states:

> "Mr. G. W. Cooke,
> *Engineer, 7 Plaza Moraga, Manila.*
>
> "Dear Sir: I beg to acknowledge your favor of the — inst., enclosing communication from Messrs. Behn, Meyer & Co. of the 28th, wherein they inquire as to the filling made by me on their Uli Uli property and request proof that 60,000 cubic meters of sand have been furnished.
>
> "The best proof I can give that the quantity of sand was supplied is their receipt for same and their weekly payments therefor as checked by their representative. I am certainly at a loss to understand the purport of the communication you enclose. My contract with Messrs. Behn, Meyer & Co. reads:
>
> " 'Material will be measured in *whatever way* the said Campbell & Go Toaco—with the approval of Behn, Meyer & Co.—deem most expedient, then spread evenly over the ground to bring the lot to a certain level.' * * *
>
> "The material was measured as taken from the bancas, a representative of Behn, Meyer & Co. being present and checking every meter as delivered. This system was pursued for almost a year, or until the entire completion of the contract. Messrs. Behn Meyer & Co. were thoroughly familiar with it. Their manager was present in numerous instances and their representative at all times. The whole process met with their approval and received their sanction, as

evidenced by their payments week after week for the number of meters checked out by their agent. No question was ever raised during the entire life of the contract as to the method of measurement pursued. The work was done, the quantity receipted for, and the payments made upon the basis above outlined. That this is the usual and customary basis for measurement in such cases cannot be gainsaid. It is the basis on which I have paid the banca men for the sand delivered me. They have been paid—meter for meter—upon the measurement adopted by the representative of Behn, Meyer & Co. and myself. As a matter of fact, the agent of Behn, Meyer & Co. refused in many instances to accept the measurement as made by the banca men, and they were compelled to return and accept more sand. It was accepted then. The books and receipts in my office show that I have paid for 60,000 cubic meters of filling. Every meter was delivered in the presence of and checked by a representative of your company. In view of this, it is not apparent what more could have been done.

"A method of measurement having been adopted and acted upon by both parties, and the contract having been completed upon that basis, it is not clear what bearing the area of ground filled, and the possible depth of the filling in particular spots thereon at this time has upon the matter. As is well known, the ground was extremely rough and broken, being virtually rice paddies, ditched and uneven, some of it swampy. The utter impossibility of estimating the amount of filling upon such ground by superficial measurement, especially after it has shrunk and shifted through a year's settling and been beaten upon by sun and storms through an entire change of season, must be apparent and such method of measurement is patent, as it specifically states that the 'Material will be measured * * * and *then* [afterwards] spread evenly over the ground,' etc. No method of superficial measurement was ever suggested, *were* payments ever made to me reserving *on* intimating such a basis. While I should regret having this matter brought into the courts, I am per-

> fectly ready to do so if the issue is forced. The contract has been fulfilled by me in every particular, and I am willing to stand upon it."

Admitting the force of section 1598, Philippine Civil Code, and the correctness of the decisions of this court in *Kihlberg vs. United States*, 97 U. S., 398; *Sweeney vs. United States*, 109 U. S., 618; *Martinsburg, &c., R. R. Co. vs. March*, 114 U. S., 549; and *Chicago & Santa Fe Railroad vs. Price*, 138 U. S., 185, to the effect that where parties to a contract have agreed upon some third person to determine the amount of labor done or materials furnished under a contract, the determination of such person as to quantities and amounts is conclusive upon the parties, in the absence of fraud or such gross error as to imply bad faith. Counsel for plaintiffs in error, in his Memorandum in Reply, contends that this provision of the Code and the principles enunciated in these decisions can have no application to this case, because no third person was agreed upon by the parties to make the measurements and determine the amount of material delivered. This, we submit, is plainly against the facts here proven.

The written agreement (Rec., 7) states:

> "Material will be measured in whatever way the said Campbell & Go-Tauco—with the approval of Behn, Meyer & Co.—deem most expedient."

This left the method of measurement to be thereafter determined upon by subsequent agreement of the parties. That it was so agreed upon, and that the measurement of the material was left by mutual agreement ~~by~~ the employee and representative of the plaintiffs in error, Behn, Meyer & Co., is perfectly manifest from the evidence. Both Mr. Campbell, Mr. Dittmar, managing partner of Behn, Meyer & Co., and Cereal, one of the men employed by Behn, Meyer & Co. to measure the material, so testify.

Campbell testifies (Rec., 17):

"Q. And was the payment for this sand agreed upon between you and Behn, Meyer & Company? How were you to be paid by Behn, Meyer & Company for this sand?

"A. The receipts were given daily, and at the end of each week, we rendered duplicate bills which were O K'd by the manager of the firm, and then presented for payment weekly.

"Q. Who gave these receipts daily, as stated by you?

"A. An authorized representative of Behn, Meyer & Company.

"Q. And was this authorized representative of Behn, Meyer & Company there all the time to receive the sand?

"A. Constantly; in fact, he lived there on the ground.

"Q. You were always paid according to the amount of the receipts were you not?

"A. I was always paid—made my bills—from the receipts given to me during the week.

"Q. Before payment, would they examine the bills or receipts or any other papers?

"A. I always furnished the receipts with the bills, and they looked over the receipts, and they had also their own book which they always went over, and the two books always corresponded—at least the receipts and their books were the same. In case there was any discrepancy in the matter of a tenth of a meter, it was always arranged right at that moment before the bill was O K'd by the manager.

"By the COURT:

"Q. Whose book is that you are talking about?

"A. The book of their authorized representative to receive the same.

"Q. The man on the ground?

"A. The man on the ground. And each week he turned in his book before I rendered my bills."

And Mr. Dittmar testifies (Rec., 29):

"Q. As the manager of Behn, Meyer & Co., did you at any time personally pay, or direct your

subordinates in the office to pay, any bills for sand?

"A. Yes, sir, I did.

"Q. Before paying any bill what books would you refer to?

"A. No books, only the receipts.

"Q. What receipts?

"A. Receipts signed by the man employed by me."

And again (Rec., 31):

"Q. Are you acquainted with the man appointed by you to count the sand?

"A. *With two of them; there were three of them.*

"Q. Is that one of them?

"A. Yes.

"Q. Do you know his name?

"A. Cercal."

And the witness Cercal (Rec., 31), who was employed by Behn, Meyer & Co. for some four months, or from October 11, 1901, to February 7, 1902, produced the book in which he testifies, he entered every cubic foot of sand delivered, by order of Messrs. Cottencamp and Dittmar, Behn, Meyer & Co.'s managers. The same method was pursued by his predecessor and his successor in employment.

As showing the actual measurement of the material and that such measurement was made exactly in accordance with the instructions given him by Behn, Meyer & Company's manager, Cercal testifies (Rec., 33):

"A. There are certain marks on both sides of the bancas, and I measured the contents by those marks which they use on the water line; and it was the instruction of Mr. Cottoncamp that it was not necessary to measure the bancas."

Here, then, was plainly an agreement between the parties to leave the measurement of the material to the agents appointed by Behn, Meyer & Company. These measurements were accepted as conclusive by both parties, and were the basis upon which payments for the material were made by

Campbell & Go-Tauco to the banca men who delivered the sand, as well as upon which payments were made to them by Behn, Meyer & Co. (Rec., 87). These measurements were the only ones made, and everything in the case clearly shows that these measurements were accepted and treated as conclusive by both parties. Surely nothing could be fairer to plaintiffs in error than thus leaving the measurement of the material to men selected by them; and, this method of determination having been adopted and agreed to by both parties, this is certainly a case where the doctrine of estoppel applies.

The area of this lot, 16,549.62 square meters, equals 178,139 square feet, or something over four acres. Certainly five test-holes, dug on such an extended area, and an estimate of the entire fill made therefrom, cannot be accepted as sufficient to affirmatively prove the quantity of the fill against the facts shown, *contra*.

V.

The contracts for the house and for the filling were in Mexican currency (Rec., 3, Ex. A; Rec., 7, Ex. D). The Philippine coinage act of Congress of March 2, 1903 (32 Stats., 691), in declaring (sec. 2) that the silver Philippine peso shall be legal tender, adds the controlling proviso:

> "That debts contracted prior to the thirty-first day of December, 1903, may be paid in the legal-tender currency of said islands existing at the time of the making of said contracts, unless otherwise expressly provided by contract."

Hence the judgment below in the money of the contract was not in any sense invalid or illegal. Alleged failure to conform to the later act of the Commission, cited by counsel, certainly could not destroy the debt nor the judgemnt. At the most, the court below could only be required to find and state in the alternative, and in the new currency, the value or

amount of such judgment. We submit that would be in any case matter for the initiative of the party in whose favor the judgment stood—not for the judgment debtor to plead as in discharge of a judgment.

Respectfully submitted,

ALDIS B. BROWNE,
ALEX. BRITTON,
Counsel for Defendants in Error.

Supreme Court of the United States.

No. 227.—October Term, 1906.

Behn, Meyer & Co., Plaintiff in Error, vs. Campbell & Go Tauco. } In error to the Supreme Court of the Philippine Islands.

[April 8, 1907.]

The defendants in error, hereinafter called the plaintiffs, brought an action in the Court of First Instance of the city of Manila in the Philippine Islands, to recover from the plaintiff in error, hereinafter called the defendant, the sum of 9,250.62 pesos, alleged to be due on account of labor and materials furnished under a building contract and its modifications. The defendant among other defenses set up first, that the labor was performed in a negligent and unworkmanlike manner, which caused the defendant great damages; and, second, that the plaintiffs contracted in writing with the defendant to fill a certain lot of land with earth and sand at a given rate per cubic meter, and had been paid upon their representation of the amount of earth and sand used in the filling $81,497.65, Mexican currency; that the amount of sand and earth used was much less than that represented, and that the plaintiffs had been overpaid $41,197.63, Mexican currency. The defendant sought to recover this overpayment by way of counter claim. A trial before the judge of the Court of First Instance resulted in a finding that the defendant had been damaged through the negligent and unworkmanlike manner of furnishing the labor under the building contract and its modifications, to an amount equal to the sum remaining due under the terms of that contract, and that there had been an overpayment on the filling contract, as alleged by the defendant. Accordingly judgment was rendered dismissing the plaintiffs' complaint and that the defendant recover from the plaintiffs $52,000 Mexican currency. The plaintiffs appealed to the Supreme Court of the Islands. That court found as a fact substantially that the plaintiffs had fully complied with their contract and were entitled to recover the amount they alleged to be due; that the amount paid by the defendant to the plaintiff on account of filling was determined by actual measurements made at the time of the filling by defendant's representatives; that there was no fraud or mistake, and that the defendant, therefore, was not entitled to recover anything on account of overpayment on that account. The judgment of the Court of First Instance was reversed, and judgment ordered for the plain-

tiffs in the sum of $9,250.62, Mexican currency. Thereupon the defendant appealed to this court. The appeal was dismissed by this court for want of jurisdiction. The defendant then sued out a writ of error, which was allowed by a justice of the Supreme Court of the Philippine Islands, and filed with its petition the following assignment of errors:

"1. The Supreme Court of the Philippine Islands erred in reversing the judgment of the Court of First Instance for the city of Manila to the effect that the plaintiffs in error were entitled to the sum of $9,250.62, Mexican currency, as damages sustained by reason of the faulty construction of the premises in question.

"2. The Supreme Court of the Philippine Islands erred in reversing the judgment of the Court of First Instance for the city of Manila granting judgment in favor of the plaintiff in error in the sum of $52,000, Mexican currency, the amount overpaid by the plaintiffs in error to the defendants in error for the delivery of sand.

"3. The Supreme Court of the Philippine Islands erred in finding as matters of fact the following:

"(1.) That in the construction of the building the contract, plans and specifications have been complied with, with the exception of a variation to the advantage of the owner, which is that the principal posts rest upon layers of stone, instead of upon the ground as called for by the plan.

"(2.) That if there has been any variation from the original plan, this was done largely, if not wholly, with the consent of the owner, and, at all events, with that of his agent, the inspecting engineer, and that these changes have been improvements.

"(3.) That the house was constructed under a contract and specifications which did little more than to designate the size of the building, the material to be employed, and, with the plan, gave a drawing of the building, leaving the details necessary almost completely to the direction of the inspecting architect or engineer.

"(4.) That the owner entrusted the direction of the work to an inspecting engineer selected by himself, with full authority to represent him, and that the contractor has performed the work solely in accordance with the direction of the said inspecting engineer.

"(5.) That although there is some evidence to indicate that a part of the house has settled more than other parts, this is due either to the ground itself or to a defect in plan, or to the directions of the inspecting engineer, and cannot be attributed to a failure on the part of the contractor to comply with the conditions of the contract.

"(6.) If there are any cracks in the floor and in the joints in the building, this is due to the class of lumber which was selected by the owner.

"(7.) That the plan of the work and the placing of the principal posts were approved by the city engineer and were in conformity with the ordinances.

"(8.) That the owner took possession of the house in the month of May, 1902, and has occupied it since that time as a dwelling house.

"By the very fact of accepting the house and occupying it, the defendants acknowledged that it was constructed substantially as required by

the contract, plans, and specifications; and this is the law even when the work is not done according to the contract, but accepted.

"4. The Supreme Court of the Philippine Islands erred in not finding that the evidence in the case was not sufficient to justify the court reversing the judgment of the Court of First Instance.

"5. The Supreme Court of the Philippine Islands erred in reversing the judgment of the Court of First Instance for the city of Manila, and in giving judgment against the plaintiff in error in the sum of $9,250.62, Mexican currency.

"6. The Supreme Court of the Philippine Islands erred in not confirming the judgment of the Court of First Instance of the city of Manila in giving judgment in favor of the plaintiff in error in the sum of $52,000, Mexican currency."

Mr. Justice MOODY, after making the foregoing statement, delivered the opinion of the Court.

The defendant first appealed from the judgment of the Supreme Court of the Philippine Islands, which had been rendered against it, and the appeal was dismissed. 200 U. S. 611. The reason, so plain, that it seemed not to require statement, was that errors alleged to have been committed in an action at law can be reviewed here only by writ of error. This in the absence of modification by statute is the rule in respect to all courts whose records are brought here for review. *Walker* v. *Dreville*, 12 Wall. 440; *United States* v. *Hailey*, 118 U. S. 233; *Deland* v. *Platte County*, 155 U. S. 221; *Comstock* v. *Eagleton*, 196 U. S. 99.

The defendant, having failed in its appeal, has now brought a writ of error and asks this court to review the facts to the same extent that they would be reviewed on appeal. But this overlooks the vital distinction between appeals and writs of error which has always been observed by this court, and recognized in legislation. An appeal brings up questions of fact as well as of law, but upon a writ of error only questions of law apparent on the record can be considered, and there can be no inquiry whether there was error in dealing with questions of fact. *Wiscart* v. *Dauchy*, 3 Dall. 321; *Generes* v. *Campbell*, 11 Wall. 193; *United States* v. *Dawson*, 101 U. S. 569: *England* v. *Gebhard*, 112 U. S. 502; *Martinton* v. *Fairbanks*, 112 U. S. 670; *Dower* v. *Richards*, 151 U. S. 658 (where the cases are reviewed by Mr. Justice Gray;) *Elliott* v. *Toeppner*, 187 U. S. 327; § 1011, R. S.

The assignment of errors in the case at bar does not allege any errors of law but deals exclusively with questions of fact. There are six assignments. The first, second, fifth and sixth assignments severally allege that the Supreme Court erred in rendering the judgment which it did and in reversing the judgment of the Court of First Instance. The third assign-

ment specifically recites that "the Supreme Court of the Philippine Islands erred in finding as matters of fact the following;" then come eight specifications of errors in such findings. It is, however, argued by counsel that the fourth assignment of errors in effect alleges an error in law. That assignment is as follows: "The Supreme Court of the Philippine Islands erred in not finding that the evidence in the case was not sufficient to justify the court reversing the judgment of the Court of First Instance."

The Philippine Code of Procedure (Public Laws of Philippine Commission, Act 190, 1901,) prescribes in chapter 22 the practice of the Supreme Court in reviewing the judgments of courts of first instance. It confines the review to questions of law, with certain exceptions, one of which is as follows:

"If the excepting party filed a motion in the Court of First Instance for a new trial, upon the ground that the findings of fact were plainly and manifestly against the weight of evidence, and the judge overrules said motion, and due exception was taken to his overruling the same, the Supreme Court may review the evidence and make such findings upon the facts and render such final judgment as justice and equity require. But, if the Supreme Court shall be of the opinion that the exception is frivolous and not made in good faith, it may impose double or treble additional costs upon the excepting party, and may order them to be paid by counsel prosecuting the bill of exceptions, if in its opinion justice so requires." § 497, subdiv. 3.

The Supreme Court, in the case at bar, acted upon the authority conferred by this subdivision. It is said that the Supreme Court can review the evidence taken in the Court of First Instance and thereby arrive at a different conclusion of facts from that found by the trial court only in the case that "the findings of fact were plainly and manifestly against the weight of evidence." It is therefore urged that whether the court erred in setting aside the conclusions of the lower court as plainly and manifestly against the weight of evidence is a question of law which may be brought here by writ of error. It was held in *De la Rama* v. *De la Rama*, 201 U. S. 303, that upon an appeal this court will consider whether a reversal by the Supreme Court of the findings of the Court of First Instance was justified on the ground that the findings below were plainly and manifestly against the weight of evidence, and upon being satisfied that the action of the Supreme Court was not warranted on that ground would reverse it. But this case was one of appeal, and the vital distinction between an appeal and a writ of error has already been shown. The principle acted upon in that case is not applicable to writs of error. The fourth assignment of error, therefore, raises no question of law.

The case would stop here were it not for the fact that the defendant in its brief and in the oral argument in its behalf goes beyond the assignment of errors and sets up three alleged errors of law not contained in them.

It is said that the court below erred:

"(1) In holding as a matter of law that the fact of taking possession of said dwelling house was an acknowledgment by the plaintiffs in error that it was constructed substantially as required by the said contract;

"(2) In holding as a matter of law that the plaintiffs in error were not entitled to recover their overpayments for earth and sand because no mutual mistake was shown in the premises;

"(3) In rendering judgment for a sum in Mexican currency instead of in Philippine pesos."

It is provided in the act giving this court jurisdiction to review the judgments of the Supreme Court of the Philippine Islands that they may be reviewed here "in the same manner, under the same regulations, and by the same procedure, as far as applicable, as the final judgments and decrees of the Circuit Court of the United States." In such cases alleged errors not stated in the assignment of errors filed with the petition for the writ, have sometimes been considered. The limits of this practice is accurately stated in the thirty-fifth rule of this court. There it is said that if errors are not assigned with the petition for the writ they will be disregarded, except that the court in its option may notice a plain error not thus assigned.

But we find no such plain error in the opinion of the Supreme Court as warrants us in reversing its judgment. The findings of fact made by that court support and require the judgment which it rendered. We do not think it necessary or desirable to select from an opinion, which was engaged with a discussion of evidence and the inferences which might properly be drawn from it, statements of law and subject them to minute scrutiny, where on the whole it is clear that the facts found by the court justify the judgment which it rendered. Therefore we do not consider any questions except those set forth in the assignment of errors, and, deeming that they allege no errors in law, we affirm the judgment.

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.